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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN HOSPITAL ASSOCIATION; WEST VIRGINIA HOSPITAL ASSOCIATION; STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY; CHARLES TOWN GENERAL HOSPITAL; WEIRTON MEDICAL CENTER, INC.; SISTERSVILLE GENERAL HOSPITAL; WHEELING HOSPITAL, INC.; and the CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES,

Plaintiffs-Petitioners,

v.

DAVID K. HEYDINGER, M.D.,
Director of the West Virginia Department of Health,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a state statute requiring that the boards of directors of all privately owned non-profit hospitals and local governmental hospitals must include 40 percent representation from certain designated groups impermissibly burdens protected First Amendment rights to free speech and association and conflicts with the principles recently set forth by this Court in *Pacific Gas and Electric Co. v. Public Utilities Commission,* 54 U.S.L.W. 4149 (U.S. Feb. 25, 1986), which held that a state may not force a corporation to provide a forum for potentially divergent views.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Authorities	iii
Opinions Below	2
Jurisdiction	3
Statute Involved	3, 4
Statement of the Case	4-10
Argument	10-17
I. *The Judgment of the United States Court of Appeals for the Fourth Circuit, Which Involves an Important Question of Federal Law, is in Conflict with Applicable Decisions of this Court*	
A. The West Virginia Statute Infringes Upon Protected First Amendment Rights of Affected Hospitals	10-14
B. The West Virginia Statute Is Invalid Because It Is Not a Narrowly Tailored Means of Serving a Compelling State Interest	14-17
Conclusion	18
Appendix A	1a-3a
Appendix B	1b-23b
Appendix C	1c-3c
Appendix D	1d-12d
Appendix E	1e-5e
Appendix F	1f-3f
Appendix G	1g-25g

TABLE OF AUTHORITIES

Cases:

	PAGE
American Hospital Association, et al., v. Hansbarger, 783 F.2d 1184 (4th Cir. 1986)	2
American Hospital Association, et al., v. Hansbarger, 600 F. Supp. 465 (N.D. W. Va. 1984)	2
American Hospital Association, et al., v. Hansbarger, 594 F. Supp. 483 (N.D. W. Va. 1984)	2
American Hospital Association et al., v. Hansbarger (Civ. No. 84-144-C(K)) (N.D. W. Va. Nov. 8, 1984)	2
American Hospital Association, et al., v. Hansbarger, (Civ. No. 84-144-C(K)) (N.D. W. Va. June 26, 1984)	2
Buckley v. Valeo, 424 U.S. 1 (1976)	13
Central Hudson Gas and Electric Corporation v. Public Service Commission, 447 U.S. 557 (1980)	16
First National Bank v. Bellotti, 435 U.S. 765 (1978)	4, 12
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	9
Pacific Gas and Electric Co. v. Public Utilities Commission, 54 U.S.L.W. 4149 (U.S. Feb. 25, 1986)	4, 5, 9, 10, 12, 14, 15, 17
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	13
Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984)	7, 12, 13, 14, 16

PAGE

Secretary of State v. Joseph H. Munson Co., Inc., 104 S. Ct. 2839 (1984) 8

Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 8

Federal Statutes, Regulations, and Rules

Medicaid Act, 42 U.S.C. § 1396 15

Medicare Act, 42 U.S.C. §§ 1395, *et seq.* 9, 15

National Health Planning and Resources Development Act, 42 U.S.C. § 300k 16

Peer Review Improvement Act of 1982, 42 U.S.C. §§ 1320c to 1320c - 12 (1983) 15

28 U.S.C. § 1254 (1)(1966) 3

28 U.S.C. § 1331 5

28 U.S.C. § 1343 5

HHS Medicare Conditions of Participation, 42 C.F.R. § 405.1011 *et seq.*. (1985) 6, 10

Supreme Court Rule 40.3 2

State Statutes and Regulations

West Virginia Certificate of Need Act, W. Va. Code §§ 16-2D-1 to 16-2D-13 (1979 and Supp. 1984) 16

West Virginia Health Care Cost Review Authority Act, W. Va. Code § 16-29B-1 to 16-29B-28 (Supp. 1984) 9, 15

West Virginia Health Care Facility Financial Disclosure Act, W. Va. Code § 16-5F-1 to 16-5F-6 (1979) 16

West Virginia Open Hospital Proceeding Act, W. Va. Code §§ 16-5G-1 and 2 (Supp. 1984) 16

PAGE

W. Va. Code § 16-5B-6 3

W. Va. Code § 16-5B-6a ..... *passim*

W. Va. Code § 16-5B-11 3

W. Va. Dept. of Health Hospital Licensure Regs., Ch. 16-5B, §§ 7.1-7.21 ..... 6, 10

Miscellaneous

American Hospital Association, *Guidelines: Identification, Selection, and Orientation of New Hospital Trustees* (1977) 7

American Hospital Association, *Guidelines: Role and Functions of the Hospital Governing Board* (1982) 8, 11

Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals* (1986) 6, 10, 11

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Plaintiffs-Petitioners,

v.

DAVID K. HEYDINGER, M.D.,
Director of the West Virginia Department of Health,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The American Hospital Association ("AHA"), a private, non-profit corporation; the West Virginia Hospital Association ("WVHA"), a private, non-profit corporation; Stonewall Jackson Memorial Hospital Company, a private, non-profit, charitable corporation; Charles Town General Hospital, a private, non-profit, charitable corporation; Weirton Medical Center, Inc., a private, non-profit, charitable corporation; Sistersville General Hospital, a city hospital; Wheeling Hospital, Inc., a private, non-profit, charitable corporation; and The Catholic Health Association of the United States ("CHA"), a private, non-profit corporation ("Petitioners"), hereby request that this Court issue a writ of certiorari to review the judgment of the

United States Court of Appeals for the Fourth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, in *American Hospital Association, et al. v. Hansbarger* (App. A., *infra,* 1a-3a), is reported at 783 F.2d 1184 (4th Cir. 1986). The opinion of the district court, in *American Hospital Association, et al. v. Hansbarger* (App. B, *infra,* 1b-23b), is reported at 600 F. Supp. 465 (N.D. W. Va. 1984). The order of the district court in this matter consolidating trial on the merits with the previous hearing on plaintiffs' motion for a preliminary injunction (App. C, *infra,* 1c-3c), is unreported (Civ. No. 84-144-C(K)) (N.D. W. Va. Nov. 8, 1984). The memorandum opinion and judgment order of the district court denying preliminary relief in this matter (App. D, *infra,* 1d-12d), is reported at 594 F. Supp. 483 (N.D. W. Va. 1984). The memorandum opinion and order of the district court denying plaintiffs' motion for a temporary restraining order (App. E, *infra,* 1e-5e), is unreported (Civ. No. 84-144-C(K)) (N.D. W. Va. June 26, 1984).

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[1] AHA has no parent or non-wholly-owned subsidiary companies; its only affiliate is the Hospital Research and Educational Trust. WVHA has no parent or non-wholly-owned subsidiary companies; its only affiliate is the West Virginia Hospital Research and Educational Foundation, Inc. None of the remaining Petitioners has any parent companies, subsidiaries that are not wholly-owned, or affiliates.

The plaintiffs-appellants in this proceeding before the U.S. Court of Appeals for the Fourth Circuit are the same as Petitioners herein. However, L. Clark Hansbarger, then Director of the West Virginia Department of Health and defendant-appellee before the Fourth Circuit, was succeeded in that position by David K. Heydinger, M.D., on April 15, 1985. Pursuant to Supreme Court Rule 40.3, David K. Heydinger, M.D., therefore is substituted for L. Clark Hansbarger as Respondent herein.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966).

STATUTE INVOLVED

West Virginia Code § 16-5B-6a attempts to control 40 percent of the total membership of certain hospitals' boards of directors, and as such is a statute entirely unprecedented in both its nature and effect. Specifically, W. Va. Code § 16-5B-6a (App. F, *infra,* 1f-2f), which applies to all privately owned non-profit hospitals and to local governmental hospitals, requires that as of July 1, 1984, at least 40 percent of a hospital's board of directors must be composed of an equal proportion of "consumer representatives" from four designated groups: "[s]mall businesses, organized labor, elderly persons and persons whose income is less than the national median income." The statute also specifies that "[s]pecial consideration shall be made to select women, racial minorities and handicapped persons." W. Va. Code § 16-5B-6a(d) authorizes the Respondent "or any citizen of the county wherein any offending hospital is located" to file suit to enforce the provisions of the statute (App. F, *infra,* 2f).

West Virginia Code § 16-5B-6 (App. F, *infra,* 1f) further authorizes Respondent to suspend or revoke a hospital's license for violation of W. Va. Code § 16-5B-6a. In addition, W. Va. Code § 16-5B-11 (App. F, *infra,* 2f-3f) provides that any person or entity managing or operating a hospital in violation of W. Va. Code § 16-5B-6a is guilty of a crime and shall be fined up to five hundred dollars or imprisoned for up to ninety days or both. Nominally enacted as a cost containment measure, W. Va. Code § 16-5B-6a thus exposes hospitals to

severe civil and even potential criminal penalties where they do not or perhaps even cannot reconstitute the membership of their boards of directors so as to comply with the statute's required representation of special interest groups.

STATEMENT OF THE CASE

1. This case is one of first impression arising out of the inappropriate attempt by the State of West Virginia, through W. Va. Code § 16-5B-6a, to intercede directly into the management of all privately owned non-profit hospitals and local governmental hospitals. Declaring that "a crisis in health care costs exists," the West Virginia Legislature responded by requiring that the boards of directors of all affected hospitals must reflect 40 percent representation from four specified categories of "consumer representatives": small business, organized labor, the elderly, and low-income persons (App. F, *infra,* 1f-2f). It is important to recognize that hospitals have been the subject of numerous federal and state statutory and regulatory enactments, many of which have cost containment as a primary purpose.[2] Yet none had ever gone so far as to interfere with a hospital's right to select those trustees who demonstrate an ability to serve the hospital's mission and the community as a whole, and instead, to force association solely " 'based on the identity of the interests that [the special interest advocate] may represent.' " *Pacific Gas and Electric Co. v. Public Utilities Commission,* 54 U.S.L.W. 4149, 4153 (U.S. Feb. 25, 1986) (quoting *First National Bank v. Bellotti,* 435 U.S. 765, 784 (1978)).

2. On June 25, 1984, AHA, WVHA, CHA, four non-profit hospitals (each a privately owned, charitable institution), and one local governmental (city) hospital filed suit in the United

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[2] For identification of nine different federal and state programs that apply to hospitals in West Virginia and that have as a primary purpose control of hospital costs, see pages 15-16, *infra.*

States District Court for the Northern District of West Virginia on behalf of themselves or as representatives of their members. Federal jurisdiction was predicated upon 28 U.S.C. §§ 1331, 1343. The verified complaint sought declaratory as well as preliminary and permanent injunctive relief against implementation of W. Va. Code § 16-5B-6a, on the ground that the statute unlawfully infringes upon fundamental rights of affected hospitals.[3] The judgment of the Fourth Circuit upholding the statute should be reconsidered in light of this Court's recent decision in *Pacific Gas and Electric Co. v. Public Utilities Commission,* 54 U.S.L.W. 4149 (U.S. Feb. 27, 1986), holding that forced association with potentially conflicting views burdens First Amendment rights.

3. The question raised in this case is one of critical importance to hospitals, nationally as well as within West Virginia.[4] Decision of this question will directly affect the ability of hospital boards of directors to govern effectively and thus for board members to discharge their legal and moral responsibilities to their institution, its patients and the community it serves.

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[3] The complaint in the district court also alleged various other claims arising under the United States Constitution as well as the West Virginia Constitution. For purposes of this Petition for a Writ of Certiorari, Petitioners advance only those claims arising under the First and Fourteenth Amendments to the United States Constitution.

[4] On April 18, 1986, the West Virginia Department of Health adopted an "Emergency Legislative Rule" implementing W. Va. Code § 16-5B-6a. This Rule defines "applicable hospitals" to include (in addition to local governmental hospitals) "all nonprofit hospitals, whether governed by an in-state or out-of-state board of directors." According to W. Va. Code §§ 16-5B-6(1); 16-5B-11 (App. F, *infra,* 1f-3f), violation of any rule or regulation carries the same civil and potential criminal penalties discussed at pages 3-4, *supra.* The prospect of imminent implementation of this unprecedented statute, on an emergency basis and in express reliance upon the erroneous judgment of the Fourth Circuit below, creates an increased urgency for review by this Court.

4. The primary mission and goal of this nation's hospitals is actually two-fold: to provide patients with hospital and medical care that is both of high quality and cost-effective. This mission, as well as the responsibility of the hospital's board of directors for its accomplishment, derives not only from the fundamental nature of the instituion and the fiduciary loyalties owed it by its directors, but also from the operation and requirements of federal and state law. *See, e.g.,* HHS *Medicare Conditions of Participation,* 42 C.F.R. § 405.1021 (1985) (requiring that to participate in the Medicare program a hospital must "ha[ve] an effective governing body legally responsible for the conduct of the hospital as an institution"); Joint Commission on Accreditation of Hospitals ("JCAH"), *Accreditation Manual for Hospitals* 4.1 (1986) (requiring that to be accredited a hospital must have "[a]n organized governing body ... [that] is responsible for establishing policy, maintaining quality patient care, and providing for institutional management and planning"); W. Va. Dept. Health Hospital Licensure Regs., ch. 16-5B, § 7.2.1(1983) ("[t]here shall be a governing authority legally and morally responsible for the management and control of the hospital").

5. In order to discharge the critical responsibilities discussed above, hospital boards are typically comprised of dedicated and experienced individuals who share a range of important goals and values and in particular share an overriding commitment to serve their particular institution and its patients as well as its mission and philosophy. Effective hospital governance requires that directors be thoughtfully selected and retained on the basis of demonstrated ability to serve the hospital's mission and the interests of the community as a whole, and not as representatives of particular special interest groups. West Virginia hospitals, of course, have always been free to draw board members from all categories of persons. The operation of W. Va. Code § 16-5B-6a is to force inclusion of individuals who otherwise might not be selected,

but who represent the special interests designated in the statute. As indicated by the evidence before the court below:

> [T]he governance of our social institutions should be entrusted to individuals of high moral character who display such personal traits as strong commitment, intelligence, integrity, courage, a capacity for compromise, and a capacity for growth. It is most important that the board select individuals who not only have these qualities but who also will commit long hours of service over many years.... It is most desirable to achieve a blend of constituent elements.... However, board members *should not be selected as representatives of special interest groups.* Rather, a mix of several kinds of expertise is desirable. (Emphasis added.)

(App. G, *infra*, 6g-7g) (American Hospital Association, *Guidelines: Identification, Selection, and Orientation of New Hospital Trustees* (1977) (hereinafter *Guidelines on Selection of New Trustees)*)

6. The selection of the members of a hospital's board of directors and the nature of that board's activities are constitutionally protected. In *Roberts v. United States Jaycees,* 104 S. Ct. 3244, 3251 (1984), this Court set forth factors that are relevant in determining whether an organization or entity is entitled to constitutional protection of freedom of association. Such factors include "size, purpose, policies, selectivity, [and] congeniality...." *Id.* Unlike the Jaycees, which this Court characterized as "large and basically unselective groups," *id.,* hospital boards of directors are typically small groups that exercise a "high degree of selectivity in decisions to begin and maintain the affiliation...." *Id.* at 3250.

Also in *Jaycees,* this Court in listing certain activities of that organization specifically recognized that "civic, charitable, lobbying, [and] fundraising" activities are among those "worthy of constitutional protection under the First Amendment." *Id.* at 3254. The hospitals affected by the operation of W. Va. Code § 16-5B-6a are primarily, though not exclusively, private, non-profit, charitable organizations. In the above-quoted pas-

sage from *Jaycees, id.* at 3254, this Court referenced *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632 (1980), which had established that solicitations by charitable corporations involve protected speech, a principle since reaffirmed by this Court in *Secretary of State v. Joseph H. Munson Co., Inc.,* 104 S. Ct. 2839 (1984). Indeed, a key responsibility of the board of directors of a non-profit charitable hospital is to oversee and supervise private contributions to assist in financing the operation of the hospital. *See* App. G, *infra,* 20 g. (American Hospital Association, *Guidelines: Role and Functions of the Hospital Governing Board* ("[t]he board should actively encourage philanthropic support to the hospital") (hereinafter *Governing Board Guidelines).*

Finally, and without regard to charitable status, the composition and activities of hospitals' boards of directors must be afforded First Amendment protection because those boards, of necessity, are responsible for communicating statements to the public concerning the nature and extent of the health care services that each particular institution provides, as well as other health-related issues of common community concern. Indeed, the board of directors is the embodiment and the "voice" of the institution. *See* App. G, *infra,* 16g (AHA, *Governing Board Guidelines*). The statute at issue requires the realignment of at least *40 percent* of the membership of the boards of affected hospitals. Such a drastic change in the composition of the hospitals' boards of directors cannot help but alter the nature of all such activities and communications. The serious intrusion represented by W. Va. Code § 16-5B-6a also will almost certainly change the public positions taken by affected hospitals over time.[5] The ability of the board to select

[5] "Adding a new member to a hospital board is a significant event not only for the individual but for the board itself. Each new member represents a new influence, a new ingredient, that must be blended into the existing structure and that is bound to have its own lasting effect." App. G, *infra,* 6-g (AHA, *Guidelines On Selection of Hospital Trustees).*

members based upon both their demonstrated ability to serve the institution and shared sense of mission, loyalty and responsibility will be seriously impaired. This burden will be even more acute with respect to religiously-sponsored hospitals, which are also subject to the forced representation requirements of W.Va. Code § 16-5B-6a.

7. In *Pacific Gas and Electric,* 54 U.S.L.W. at 4154, this Court plainly stated that "forced association" with potentially conflicting views "burdens protected speech" and can be justified only if the intrusion is "a narrowly tailored means of serving a compelling state interest." Numerous other less intrusive means exist for the State to serve a legitimate interest in cost containment. The potential effect, if any, of W. Va. Code § 16-5B-6a on costs is at best highly speculative given that under the West Virginia Health Care Cost Review Authority's permanent hospital rate-setting methodology and under the Federal Medicare Program's prospective payment system, 100 percent of the funds received for health care services are controlled by operation of state and federal law. *See* App. G, *infra,* 1g. Finally, it is apparent that the means chosen by the State are in fact irrational when analyzed in light of the cost containment goal. The majority of persons provided health care services in this country are at least partly insulated from the cost consequences because of the availability of programs of government subsidies or private insurance. The State has forced inclusion of special interests—for example, the elderly and indigent—whose concerns focus more on access and availability of services (i.e., demand) than on cost.

8. In its decision dated December 18, 1984, the district court rejected Petitioners' constitutional claims without careful analysis and in an apparent belief that W. Va. Code § 16-5B-6a is a matter of simple "economic regulation." Yet the economic interests of a state, while legitimate, must also be subjected to close scrutiny when fundamental rights are infringed upon. *See, e.g., Memorial Hospital v. Maricopa County,* 415 U.S. 250

(1974). In a *per curiam* decision dated February 27, 1986, the Fourth Circuit affirmed the district court, without any independent analysis of the issues raised and for the reasons set forth in the district court's opinion. The judgment of the Fourth Circuit conflicts with and therefore should be reconsidered in light of the principles set forth by this Court in *Pacific Gas and Electric,* which held that forced association with potentially opposing views burdens protected First Amendment rights.

ARGUMENT

I. The Judgment of the United States Court of Appeals for the Fourth Circuit, Which Involves an Important Question of Federal Law, is in Conflict with Applicable Decisions of this Court

A. The West Virginia Statute Infringes Upon Protected First Amendment Rights of Affected Hospitals

As discussed above, a hospital's board of directors is legally and morally responsible for the management and conduct of the institution. *See, e.g.,* HHS *Medicare Conditions, supra,* 42 C.F.R. § 405.1021; W. Va. Dept. Health Regs., *supra,* ch. 16-5B, § 7.2.1. The board of directors is directly responsible for setting hospital policy, as well as for institutional management and planning. *See, e.g.,* JCAH *Accreditation Manual, supra,* at 4.1. The board of directors appoints the hospital's chief executive officer and holds that person responsible for operation of the institution in accordance with policies established by the board. *See, e.g.,* HHS *Medicare Conditions, supra,* 42 C.F.R. § 405.1021(f)(g); W. Va. Dept. Health Regs., *supra,* ch. 16-5B, § 7.1. Further, and most critically, given the nature of the hospital's mission, the hospital board of directors is responsible for maintaining the quality of patient care delivered in the institution. *E.g.,* JCAH *Accreditation Manual, supra,* at 4.1. The board formally appoints the members of the medical

staff, based upon organized medical staff recommendations, and must assure that there is in place an effective and ongoing quality assurance program. *See,* JCAH *Accreditation Manual,*

Further, the hospital board of directors is the embodiment and the "voice" of the institution with respect to the hospital's mission and its position as it relates to the medical staff, to administrative personnel and to the community as a whole. As indicated by the evidence before the court below, "[t]he governing board has the authority and responsibility for monitoring and influencing public policies concerning the delivery of health care and for ensuring the establishment and maintenance of appropriate external relationships." (App. G, *infra,* 16g) (AHA, *Governing Board Guidelines*).[6] Virtually all of the hospital board's activities are inextricably bound up in and defined by what is a unique association of individuals who share a common dedication and who gather for the expression and communication of ideas indigenous to the particular hospital. Thus, Petitioners' First Amendment right to association is inextricably connected with their right to speech.

Recent decisions of this Court compel recognition of hospitals' protected rights of association in the selection of

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[6]"The governing board's external relationships may include: dialog with patients in the community to ensure the appropriateness of the institution's mission and goals and its ability to identify community health care needs; communication with local business, industry, and professional and civic organizations; liaison with other health planning and health promotion organizations that serve all or part of the same community; liaison with the institution's local, state, and federal government representatives and agencies, as well as with the local public information media; and ongoing relations with other community service organizations, schools, and social agencies. Such relationships will help to ensure that the public's perception of its health care needs and the institution's assessments of those needs are closely aligned and that the institution's services are organized to meet those needs." App. G, *infra,* 17g-18g (AHA, *Governing Board Guidelines).*

board members. As discussed *supra,* hospital board members are thoughtfully selected and retained on the basis of specific criteria and demonstrated ability to serve the mission of the institution. *See Jaycees,* 104 S. Ct. at 3250. In addition, most hospitals affected by the operation of W. Va. Code § 16-5B-6a engage in a range of civic, charitable fundraising, or other activities which this Court has specifically concluded are "worthy of constitutional protection under the First Amendment."[7] *Id.* at 3254. Indeed, certain of those hospitals are religiously-sponsored, with boards whose members share a particularly personal and selective relationship and whose activities are clearly intended to make a statement about their faith and religious mission.[8] *See, e.g., id.* at 3249-50.

More recently, however, in *Pacific Gas and Electric Co. v. Public Utilities Commission,* 54 U.S.L.W. 4149 (U.S. Feb. 25, 1986), this Court has also recognized the right of a corporation to be free of state compulsion intended to provide a forum for views that may differ from its own. "Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Id.* at 4151 (quoting *First National Bank v. Bellotti,* 435 U.S. 765, 783 (1978). In *Pacific Gas and Electric,* this Court invalidated on First Amendment grounds a state Public Utilities Commission requirement that the utility include in its billing envelopes speech (printed messages) of a group representing the interests of residential ratepayers. 54 U.S.L.W. 4149. Such "forced association with potentially hostile views," this Court held, burden protected forms of expression. *Id.* at 4154. In the instant case as well, the State would seek to force association based upon one's status as a special interest advocate, rather than as a fiduciary committed to serving the mission of the hospital and the *entire* community that it serves. This serious potential divergence of interests and

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[7] *See generally* pages 7-9, *supra.*

[8] *See also* pages 13-14, *infra.*

loyalties among the hospital's directors will almost certainly alter the public positions taken by affected hospitals over time—as was undoubtedly anticipated by the West Virginia Legislature when it enacted W. Va. Code § 16-5B-6a. Yet, the decisions of this Court "establish that the State cannot advance some points of view by burdening the expression of others." *Pacific Gas and Electric,* 54 U.S.L.W. at 4154. *See also Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976).

The nature and extent of the State's interference with fundamental rights, and therefore the substantial harm that will occur if this statute is permitted to stand, is demonstrated even more graphically by its effect upon certain Catholic religious orders which operate hospitals subject to the requirements of W. Va. Code § 16-5B-6a.

The Sisters of the Pallottine Missionary Society (the "Sisters"), for example, is a voluntary association of nuns (a religious order), the primary purpose of which is to "carry out the mission of Christ." The Sisters sponsor, own, and operate St. Joseph's Hospital in Buckhannon, West Virginia, as an unincorporated activity of the religious order. They believe that health care is a special ministry of the Church, and in carrying out their goal the Sisters desire to associate only with others who share their paramount devotion and dedication to their religious mission. Theirs is precisely the kind of voluntary, intimate and highly selective associational relationship that the First Amendment is intended to protect. *See, e.g., Roberts v. Jaycees,* 104 S. Ct. at 3249-50; *Pierce v. Society of Sisters,* 268 U.S. 510, 533-36 (1975).[9] And in fulfilling their mission, they are making a statement: about faith, about caring, and about

[9] The Sisters in particular share a common dedication and desire "to promote the Greater Honor and Glory of God and to continue the work of their Founder, St. Vincent Pallotti, by caring for the sick and the poor," a basic mission and philosophy that is also reflected in the bylaws of St. Joseph's Hospital (App. G, *infra,* 22g-24g).

compassion.[10] The Sisters provide health care to the sick and injured because they believe the Lord called them to do so. In order to ensure that the local hospital board remains responsive to the hospital's and the Sisters' religious mission, the Sisters have required that at least 70 percent of the local board must be members of the religious order. Certainly, W. Va. Code § 16-5B-6a interferes directly with the Sisters' continued ability and freedom to associate in this manner and in pursuit of activities protected by the First Amendment.

B. The West Virginia Statute Is Invalid Because It Is Not a Narrowly Tailored Means of Serving a Compelling State Interest

As this Court made clear in *Pacific Gas and Electric,* infringement by the State on protected First Amendment rights can be valid only where it represents "a narrowly tailored means of serving a compelling state interest." 54 U.S.L.W. at 4154 (citations omitted). *See also Jaycees,* 104 S. Ct. at 3252. The State of West Virginia has sought to address what it terms "a crisis in health care costs" by forcing all privately owned non-profit hospitals and local governmental hospitals to include 40 percent special interest representation on their boards of directors. (App. F, *infra,* 2f.) In assessing W. Va. Code § 16-

[10] The district court, whose reasoning was adopted by the Fourth Circuit, confused the issues before it and offhandedly dismissed serious constitutional objections by relying on conclusory statements such as that the operation of a hospital "is not essential to the expression or advocation of one's religious beliefs." (App. B, *infra,* 13b.) However, the Sisters have never argued that operating a hospital is *essential* to advocating their religious beliefs, or that it constitutes the exercise of religion. But they do argue that by operating a religious hospital they speak volumes about the message of their religion. Certainly the Sisters' caring and commitment are communicated to their patients. As this Court indicated in *Jaycees,* 52 U.S.L.W. at 5076, "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both its forms may be implicated."

5B-6a, it is most appropriate to focus, as this Court did in *Pacific Gas and Electric,* on the means chosen by the State and whether those means are narrowly tailored to serve what is a legitimate interest in cost containment. *See* 54 U.S.L.W. at 4154. When viewed from that perspective, it is apparent that the "difficulty" with the State's position in this case is precisely the same as in *Pacific Gas and Electric*—specifically, that the State can and "[i]ndeed . . . already does" serve "[its] interest through means that would not violate appellant's First Amendment rights. . . ." *Id.* at 4154 & n.16. Indeed, a review of the federal and state statutory and regulatory programs applicable to West Virginia hospitals demonstrates that in fact W. Va. Code § 16-5B-6a can have no material independent effect upon hospital costs.

Most notably, the Federal Government, through the Medicare Programs' prospective payment system, and the State itself, through the West Virginia Health Care Cost Review Authority's permanent hospital rate-setting methodology, have implemented comprehensive and powerful hospital cost containment programs. Indeed, the uncontroverted testimony in this case established that as a result of the State's own permanent hospital rate-setting methodology and federal law, 100 percent of the funds received by West Virginia hospitals for health care services are established or controlled by operation of state and federal law. (App. G, *infra,* 1g.) Yet even these direct and pervasive approaches to the issue of cost control do not require or even contemplate any action so drastic as intervention into the actual composition of a hospital's board of directors.

There are in fact at least nine distinct federal and state programs that have as a primary purpose control of hospital costs; The Medicare Act; the Medicaid Act; the Peer Review Improvement Act of 1982, 42 U.S.C. §§ 1320c to 1320c-12 (1983); the West Virginia Health Care Cost Review Authority Act, W. Va. Code § 16-29B-1 to 16-29B-28 (Supp. 1984); the

West Virginia Health Care Facility Financial Disclosure Act, W. Va. Code § 16-5F-1 to 16-5F-6 (1979); the West Virginia Open Hospital Proceeding Act, W. Va. Code §§ 16-5G-1 and 2 (Supp. 1984); the West Virginia Certificate of Need Act, W. Va. Code §§ 16-2D-1 to 16-2D-13 (1979 and Supp. 1984); and the National Health Planning and Resources Development Act, 42 U.S.C. § 300k. While these enactments have different programmatic thrusts, each is designed to promote hospital cost containment in an efficient manner and without directly intruding upon the First Amendment rights of the hospitals' governing boards.

A number of recent decisions of this Court reaffirm the principle that a statute must be invalidated where, as here, it is not sufficiently narrowly drawn to avoid interference with protected rights. *E.g., Jaycees,* 104 S. Ct. at 3252. In *Central Hudson Gas and Electric Co. v. Public Service Commission,* 447 U.S. 557, 568 (1980), the Public Service Commission argued that the "State's interest in conserving energy [was] sufficient to support suppression of advertising designed to increase consumption of electricity," and that the "promotional advertising [would] aggravate inequalities caused by the failure to base the utilities' rates on marginal cost." The Supreme Court found that the Commission's "laudable" concern did not provide "a constitutionally adequate reason for restricting protected speech." *Id.* at 569. In fact, the Court found that "[t]he impact of promotional advertising on the equity of appellant's rates [was] highly speculative," and that "conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising." *Id.*

Any contention by the State that the forced appointment of 40 percent of a hospital's board from designated special interest groups will operate to substantially contain hospital costs is both highly speculative and, as in *Central Hudson,* constitutionally inadequate as a reason for restricting protected speech. 447 U.S. at 569. Certainly the purpose of W. Va. Code

§ 16-5B-6a is to inject the views of designated special interest groups into the deliberations and activities of a hospital's board. But to repeat this Court's lesson in *Pacific Gas and Electric*, "the State cannot advance some points of view by burdening . . . others," and indeed to do so cannot constitute "a narrowly tailored means of furthering [the State's] interest." 54 U.S.L.W. at 4154. Further, and as shown above, nine separate federal and state legislative enactments that apply to hospitals in West Virginia have as a primary purpose the control of hospital costs. These ample, more direct, and less intrusive methods of achieving the State's goal negate any argument that W. Va. Code § 16-5B-6a provides a narrowly tailored means of dealing with what is a legitimate legislative purpose. Rather, the statute operates to force association with others holding potentially conflicting views, commitments and loyalties, and selects those other favored speakers solely on the basis of their viewpoints and status as special interest representatives. As such, W. Va. Code § 16-5B-6a impermissibly burdens protected First Amendment rights of affected hospitals and must be invalidated.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-1056

American Hospital Association, a private, nonprofit corporation; West Virginia Hospital Association, a private, nonprofit corporation; Stonewall Jackson Memorial Hospital Company, a private, nonprofit, charitable corporation; Charles Town General Hospital, a private, nonprofit, charitable corporation; Weirton Medical Center, Inc., a private, nonprofit, charitable corporation; Sistersville General Hospital, Inc., a city hospital; Wheeling Hospital, Inc., a private, nonprofit, charitable corporation; The Catholic Health Association of the United States, a private, nonprofit corporation,

Appellants,

Versus

L. Clark Hansbarger, Director of the West Virginia Department of Health,

Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg.

William M. Kidd, District Judge. CA 84-144-C)

Argued: November 4, 1985 Decided: February 27, 1986

Before SPROUSE and CHAPMAN, Circuit Judges and BUTZNER, Senior Circuit Judge.

Charles L. Woody (Robert J. O'Neill; Spilman, Thomas, Battle & Klostermeyer on brief) for Appellants; Donald L. Darling, Deputy Attorney-General; (Charlie Brown, Attorney General; Walt Auvil, Assistant Attorney General on brief) for Appellee.

PER CURIAM:

In 1983 the West Virginia legislature enacted what is now § 16-5B-6a of the West Virginia Code. This Act requires that

on or before July 1, 1984, at least forty percent of the Board of Directors of all non-profit and local government hospitals located in West Virginia must be composed of an equal proportion of "consumer representatives" from four categories: small business, organized labor, elderly persons, and persons whose income is less than the national median income. It provided: "Special consideration shall be made to select women, racial minorities and handicapped persons." *Id.* § 16-5B-6a(c). The text of the bill includes an explanation of the legislature's concern:

> (a) The legislature declares that a crisis in health care costs exists, that one important approach to deal with this crisis is to have widespread citizen participation in hospital decision making and that many hospitals in West Virginia exclude from their boards important categories of consumers, including small businesses, organized labor, elderly persons and lower-income consumers. The legislature further declares that non-profit hospitals receive such major revenue from public sources and are so crucial in health planning and development that it is necessary to require consumer representatives on their boards of directors. Therefore, the legislature determines that nonprofit hospitals and hospitals owned by local governments should have boards of directors representative of the communities they serve.

Id. § 16-5B-6a(a).

The Act goes on to provide the forty-percent requirement and the four categories mentioned above.

A number of non-profit hospitals and hospitals owned by a county, city, or other political subdivision, brought suit in the United States District Court for the Northern District of West Virginia, challenging the statute on constitutional grounds. In a very well-reasoned opinion, the district court found that it was not required to pass upon the wisdom of the legislature in passing the challenged statute, but to determine whether the statute violated the Constitution of the United States or the

Constitution of the State of West Virginia. The district court found no constitutional violations; we agree and affirm for the reasons set forth in the district court opinion reported as *American Hospital Association v. Hansbarger,* 600 F. Supp. 465 (N. D. W. Va. 1984).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF WEST VIRGINIA

AMERICAN HOSPITAL ASSOCIATION, a private, non-profit corporation, WEST VIRGINIA HOSPITAL ASSOCIATION, a private, non-profit corporation, STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY, a private, non-profit, charitable corporation, CHARLES TOWN GENERAL HOSPITAL, a private, non-profit, charitable corporation, SISTERSVILLE GENERAL HOSPITAL, a city hospital, WHEELING HOSPITAL, INC., a private, non-profit, charitable corporation, and THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, a private, non-profit corporation,

Plaintiffs,

Vs.

L. CLARK HANSBARGER, Director of the West Virginia Department of Health,

Defendant.

CIVIL ACTION NO. 84-0144-C(K)

OPINION

Jurisdiction of this Court is predicated upon 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. § 2201 that W. Va. Code § 16-5B-6a is unconstitutional and is an interference with collective

bargaining rights between plaintiffs and their employees, which is an area pre-empted by federal labor law.

U. S. DISTRICT COURT FILED AT CLARKSBURG, W. VA., DEC 18 1984, E. LOWELL MARKEY, CLERK.

Plaintiff American Hospital Association is a private, non-profit corporation organized and existing under the laws of the State of Illinois, having and maintaining its principal office and place of business in Chicago, Illinois, and having as members thereof individual non-profit and local governmental hospitals located throughout West Virginia, including plaintiffs Stonewall Jackson Memorial Hospital Company, Charles Town General Hospital, Weirton Medical Center, Inc., Sistersville General Hospital, and Wheeling Hospital, Inc. Plaintiff West Virginia Hospital Association is a private, non-profit corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business in Charleston, West Virginia, and having as members thereof individual non-profit and local governmental hospitals located throughout West Virginia, including plaintiffs Stonewall Jackson Memorial Hospital Company, Charles Town General Hospital, Weirton Medical Center, Inc., Sistersville General Hospital and Wheeling Hospital, Inc. Plaintiff Stonewall Jackson Memorial Hospital Company is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Weston, West Virginia, and owns and operates a seventy (70) bed hospital located in Weston, West Virginia. Plaintiff Charles Town General Hospital is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Ranson, West Virginia, and owns and operates a one hundred fourteen (114) bed hospital, known as Jefferson Memorial Hospital, located in Ranson, West Virginia. Plaintiff Weirton Medical Center, Inc. is a private, non-profit, charitable corpo-

ration organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Weirton, West Virginia, and owns and operates a two hundred sixty-five (265) bed hospital located in Weirton, West Virginia. Plaintiff Sistersville General Hospital is a local governmental hospital organized and existing under the laws of the State of West Virginia and the ordinances of the City of Sistersville, having and maintaining its principal office and place of business at Sistersville, West Virginia, and owns and operates a thirty-two (32) bed hospital located in Sistersville, West Virginia. Plaintiff Wheeling Hospital, Inc., is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Wheeling, West Virginia, and owns and operates a two hundred seventy-six (276) bed hospital located in Wheeling, West Virginia. Plaintiff The Catholic Health Association of the United States is a private, non-profit corporation organized and existing under the laws of the State of Missouri, having and maintaining its principal office and place of business in St. Louis, Missouri, and having as members thereof religious institutes, more commonly referred to as religious orders of nuns, which own, operate and sponsor certain non-profit hospitals located throughout West Virginia and which appoint the respective directors of said hospitals. Defendant L. Clark Hansbarger is the Director of the West Virginia Department of Health and in such capacity is one of the individuals who may enforce the provisions of W. Va. Code § 16-5B-61.

The plaintiffs, American Hospital Association, et al., filed this civil action on June 25, 1984, seeking declaratory and injunctive relief against the State of West Virginia and the Commissioner of Health, L. Clark Hansbarger. The complaint seeks a judgment declaring W. Va. Code § 16-5B-6a (hereinafter "the Act") unconstitutional. Plaintiffs also seek injunctive relief prohibiting the defendant from enforcing the Act.

Defendant answered, *inter alia,* that the Act is not unconstitutional and therefore plaintiffs should be denied all relief.

A hearing was conducted on plaintiffs' motion for a temporary restraining order on June 24, 1984. On June 26, 1984, the Court by memorandum opinion denied plaintiff's motion for a temporary restraining order. On July 16 and 17, 1984, the parties appeared before the Court for argument on plaintiffs' motion for a preliminary injunction. On July 24, 1984, the Court entered its order directing the parties to file their findings of fact and memoranda of law on or before July 20, 1984, and any reply brief on or before August 6, 1984. On September 20, 1984, the Court entered its opinion and order denying plaintiffs' motion for a preliminary injunction. On November 8, 1984, the Court entered its order, pursuant to stipulation of the parties, consolidating the trial of this action with the previous hearing on plaintiffs' motion for a preliminary injunction; that the motions and memoranda filed in connection with the plaintiffs' motion for a preliminary injunction be and the same hereby are submitted for the trial of this action, and that no further briefs, witnesses, or evidence be submitted in connection with the trial of this action.

This matter has been fully briefed and has been submitted to the Court for decision.

Plaintiffs challenge the Act on several grounds: (1) that the Act violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; (2) that the Act violates the Freedom of Association guaranteed to the Sisters of the Pallottine Missionary Society by the First and Fourteenth Amendments of the United States Constitution; (3) that W. Va. Code 16-5B-6a is pre-empted by the Federal Labor Laws; (4) that the Act violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution; (5) that the Act violates Section 1, Article XI of the West Virginia Constitution; (6) that the Act violates Section 4, Article XI of the West Virginia Constitution; and (7) that the Act violates the Con-

tracts Clause of the United States Constitution. The Court will address the issues in the order just stated.

W. Va. Code § 16-5B-6a requires that on or before July 1, 1984, at least forty percent (40%) of the board of directors of all non-profit and local governmental hospitals located in West Virginia must be composed of an equal proportion of "consumer representatives" from "[s]mall businesses, organized labor, elderly persons, and persons whose income is less than the national median income" and that "[s]pecial consideration shall be made to select women, racial minorities and handicapped persons" for such positions and authorizes defendant Hansbarger and private citizens to enforce its provisions. The entire text of W. Va. Code 16-5B-6a is as follows:

> (a) The legislature declares that a crisis in health care costs exists, and that one important approach to deal with this crisis is to have widespread citizen participation in hospital decision-making, and that many hospitals in West Virginia exclude from their boards important categories of consumers, including small businesses, organized labor, elderly persons and lower-income consumers. The legislature further declares that non-profit hospitals receive such major revenue from public sources and are so crucial in health planning and development that it is necessary to require consumer representatives on their boards of directors. Therefore, the legislature determines that non-profit hospitals and hospitals owned by local governments should have boards of directors representative of the communities they serve.
>
> (b) As used in this section, "applicable hospitals" means all non-profit hospitals and all hospitals owned by a county, city or other political subdivision of the State of West Virginia.
>
> (c) At least 40 percent of the boards of directors of applicable hospitals shall, on or before the first day of July, 1984, be composed of an equal proportion of consumer representatives from each of the following four categories: Small businesses, organized labor, elderly persons and persons whose income is less than the national median

> income. Special consideration shall be made to select women, racial minorities and handicapped persons.
>
> (d) The provisions of this section may be enforced by the director of health, or by any citizen of the county wherein any offending hospital is located, by the filing of an action at law in the circuit court of such county.

West Virginia Code 16-5B-6a is enforceable by injunction obtained in an action at law as set forth by W. Va. Code 16-5B-6a(d) above. Plaintiffs further argue that W. Va. Code 16-5B-6a may be enforced pursuant to W. Va. Code 16-5B-6a(d) which provides:

> The provisions of this section may be enforced by the director of health, or by any citizen of the county wherein any offending hospital is located, by the filing of an action at law in the circuit court of such county.

The defendants argue that W. Va. Code 16-5B-6a(d) does not apply and that the exclusive remedy for violation of W. Va. Code 16-5B-6a is by W. Va. Code 16-5B-6a(d).

It is clear that the Legislature's intent was to give the Director of Health or any citizen of such county the authority to seek injunctive relief against any offending hospital for violation of this section. Further, there is no conflict between W. Va. Code § 16-5B-6a(d) and W. Va. Code § 16-5B-11 and W. Va. Code § 16-5B-6a(1). W. Va. Code § 16-5B-11 provides that any person, association, corporation, or local governmental agency violating W. Va. Code § 16-5B-6a shall be fined up to five hundred dollars ($500) or imprisoned for up to ninety (90) days or both. W. Va. Code § 16-5B-6(1) authorizes defendant Hansbarger in his capacity as Director of the West Virginia Department of Health to suspend or revoke the license of a non-profit or local governmental hospital for violation of W. Va. Code § 16-5B-6a. Testimony reveals that no administrative rules and regulations have been promulgated to implement, administer or interpret W. Va. Code § 16-5B-6a.

I. EQUAL PROTECTION CLAUSE

Plaintiff alleges in Count One of its complaint that the Act is unconstitutional because it does not apply uniformly with respect to the class of all non-profit corporations in the State of West Virginia, more specifically being limited in its applicability by its terms to all non-profit corporations owning and operating hospitals in the State of West Virginia, and the classification attempted by such statute bears no rational relationship to any legitimate interest of the State of West Virginia. This claim is based upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Section 1, Article XI of the Constitution of West Virginia. The Fourteenth Amendment of the United States Constitution provides, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Plaintiffs argue that the Act employs a classification of non-profit and local governmental hospitals on one hand and for-profit and state owned hospitals on the other hand in order to achieve its stated purpose of dealing with health care costs. Further, the plaintiffs argue that such classification bears upon the members of the Sisters of the Pallottine Missionary Society's fundamental right of Freedom of Association.

The Act declares that "a crisis in health care costs exists, that one important approach to deal with this crisis is to have widespread participation in hospital decision making . . ." Under the Act, at least forty percent (40%) of boards of directors of all non-profit and local governmental hospitals located in West Virginia must be composed of an equal proportion of consumer representatives from small business, organized labor, elderly persons, and persons whose income is

less than the national median income. The Act also provides that special consideration must be given to women, racial minorities, and handicapped persons. The legislature enacted W. Va. Code 16-5B-6a with the goal of curbing the rising costs of health care within the state by giving greater citizen participation in hospital decision making. It is the hope and intent of the Legislature that greater citizen participation on the boards of non-profit and local government supported hospitals will result in greater scrutiny over the cost of health care in the state. Since the Act does not apply to profit and state owned hospitals, as opposed to non-profit and local government hospitals, the Court must determine if the classifications in the Act are reasonable in light of the Act's purpose. In *Eisenstadt v. Baird,* 405 U.S. 438, 446, the United States Supreme Court referred to *Reed v. Reed,* 404 U.S. 71, 75-76 (1972), which held:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly,* 113 U.S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *Railway Express Agency v. New York,* 336 U.S. 106 (1949); *McDonald v. Board of Election Commissioners,* 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).

The Court, in equal protection analysis, must look to the classification or interest involved. *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995 (1972). Whenever a state act is being challenged as violative of the Equal Protection Clause, the Court must look to one of two constitutional tests. If the

legislation creates a suspect classification or impinges upon a fundamental right based upon inherently suspect criteria, then the proper standard of review is strict scrutiny. There must be some showing of a compelling state interest and that the means chosen to achieve that purpose is the least restrictive alternative to meet the standards of strict scrutiny. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278 (1972). If no suspect classification exists, or there is no infringement of a fundamental right, then the appropriate standard is the rational basis test. Under the rational basis standard there must be some showing that the classification is rationally related to a legitimate state purpose. *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029 (1972).

Plaintiffs have a heavy burden. Clearly W. Va. Code 16-5B-6a is an economic regulation. Indeed, the purpose set forth in the Act states specifically that the Legislature's intent in passing such legislation is to attempt to control the rising costs of health care. *See Polloid v. Cockrell,* 578 F.2d 1002, 1012 (5th Cir. 1978); *See also Allied Stores v. Bowers,* 358 U.S. 522, 530 (1959) and *West Virginia Manufacturers Association v. United Steelworkers of American, et al,* 714 F.2d 308 (4th Cir. 1983). The Court declines to declare that W. Va. Code 16-5B-6a is an impingement so fundamental that it justifies the protections of strict judicial scrutiny.

In applying W. Va. Code 16-5B-6a, the West Virginia Legislature distinguished between making the Act applicable to non-profit and local government hospitals and not applying the Act to profit and state owned hospitals. Local government hospitals receive their appropriations from political subdivisions of the state. Non-profit hospitals receive a favorable tax status which is clearly a benefit. Indeed, the recognition as a non-profit organization under the tax laws is an indirect grant of public monies or considered as an indirect donation by the public at large:

> When the Government grants exemptions or allows deductions all taxpayers are effected; the very fact of the

> exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious "donors". Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide or which supplements and advances the work of public institutions already supported by tax revenues. . . .

Bob Jones University v. United States, ____ U.S. ____ (1983), 51 L.W. 4593, 4598. There is recognition that organizations are entitled to preferential treatment and tax benefits because they provide a benefit to society. *Bob Jones University v. United States, supra.* Clearly, non-profit hospitals are conferred an advantageous benefit which for-profit hospitals do not receive. Further, W. Va. Code 16-5B-6a does not apply to state hospitals because state hospitals are governed by the director of health and the state rather than a board of directors.

Courts have traditionally exercised judicial restraint to legislative judgment regarding public purpose or purposes based upon the general good. The Court has given great deference to the Legislature's judgment and finds that the Legislature's enactment of W. Va. Code 16-5B-6a has a rational basis. "The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. 471, 486 (1970).

Freedom of Association

The next issue is whether W. Va. Code 16-5B-6a violates the right of association guaranteed to the Sisters of the Pallottine Missionary Society by the First and Fourteenth Amendments of the United States Constitution. The plaintiff, Pallottine Missionary Society, is a religious society of the Roman Catholic Church and is organized as a corporation under the laws of West Virginia. The Pallottine Missionary Society, hereinafter referred to as "the Society", owns and operates St.

Joseph's Hospital, in Buckhannon, West Virginia. The Society argues that the Act requiring consumer representation on the boards of non-profit hospitals infringes upon their First Amendment right of Freedom of Association.

The Society is a corporation with a board of governors and provincial council which oversees its operations. St. Joseph's Hospital is not a separate corporation from the Society but is property of the Society and subject to control of the provincial council. However, St. Joseph's Hospital does have its own local board of directors whose members are appointed by the provincial council. The provincial council, composed only of Sisters of the Society, retains the power to approve or disapprove all major actions of the local board. The by-laws of St. Joseph's Hospital local board of directors requires that at least seventy percent (70%) of the local board be members of the Society of Sisters. The Society argues that they are uncertain whether W. Va. Code 16-5B-6a requires consumer representatives on its provincial council or on the local board of St. Joseph's Hospital, or both.

The Act provides that consumer representatives be placed upon "the boards of directors of applicable hospitals." Clearly, the goal is to give greater access and input into the decision making process of hospital boards in hopes of curbing the rising costs of health care. The Sisters of the Pallottine Missionary Society is a religious order of nuns of the Roman Catholic Faith whose purpose is to foster the ideals and beliefs of the Roman Catholic Faith. While the Society may have title and possession over certain hospitals, their primary purpose is the fostering of religious principles protected by the First Amendment. Indeed, the operation of a hospital would seem to be secondary to their religious obligations though the two are very compatible. It is difficult for this Court to believe that the Legislature intended to require consumer representatives on the board of directors of religious orders. The constitutionality of such legislation would be very questionable. Looking to the purpose and the plain language of the Act it appears to the Court that the Act would

only require consumer representatives on the local board of directors of the hospital and the Act would not be applicable to the religious society or its governing board.

In *Roberts v. United States Jaycees,* 104 S.Ct. 3244 (1984), the Court held that:

> . . . we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

However, the court recognized that the right to associate is not absolute:

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms.

Roberts v. United States Jaycees, supra.

In the Jaycees case the issue concerns discriminatory policies regarding membership in a young men's civic and service organization. In the present instance the issue concerns the membership of a non-profit hospital board operated by a religious order rather than membership in the religious order or its governing body. The plaintiffs entered an area which is highly regulated and were aware of the regulatory system when they entered the health services area. Further, the main purpose for operating a hospital is to provide health care. While the operation of a hospital and the right to exercise one's religious beliefs or vocation may be compatible, the primary purpose of operating a hospital is to provide health services to the public. The Act does not require Catholic hospitals to alter their creed or beliefs, nor does it prevent them from excluding individuals with ideologies or philosophies different from those

of its existing members. *Roberts v. United States Jaycees, ibid.* Indeed, testimony revealed that the plaintiffs do not exclude members of the categories set forth in the Act and that some board members of Catholic Hospitals qualify in at least one or more categories set forth in the statute. Testimony of Sister Mary Diane Bushee revealed that St. Joseph's Hospital had developed a plan to comply with the Act but had not implemented such plan because of the pending litigation. (Tr. 248)

The Court recognizes a difference between the First Amendment right of a religious society to associate for the advancement of its beliefs and ideas and the operation of a hospital. Clearly, the operation of a hospital, pursuant to the corporate laws of the state, is not essential to the expression or advocation of one's religious beliefs.

Labor Law Pre-emption

The plaintiffs argue that the Act is pre-empted by federal labor laws. The United States Supreme Court described the doctrine of pre-emption as it applies to the Labor Management Relation Act in *Belknap, Inc. v. Hale,* ____ U.S. ____, 103 S. Ct. 3172 (1983).

> Our cases have announced two doctrines for determining whether state regulations or causes of action are preempted by the NLRA. Under the first, set out in *San Diego Building Trades Council v Garman,* 359 US 236, 3 L Ed 2d 775, 79 S Ct 773 (1959), state regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the Act. Id., at 245, 3 L Ed 2d 775, 79 S Ct 773. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. In such cases, the state's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the Board's ability to

> adjudicate the controversies committed to it by the Act . . . and the risk that the state will sanction conduct that the Act protects. The second preemption doctrine, set out in *Machinists v Wisconsin Employment Relations Commission,* 427 US 132, 49 L Ed 2d 396, 96 S Ct 2548 (1976), proscribes state regulation and state-law causes of actions concerning conduct that Congress intended to be left unregulated . . . .

The plaintiffs argue that the Act's requirement of a labor representative on a hospital board of directors would disturb the balance of power between labor and management. Some of the plaintiff hospitals recognize certain unions as bargaining representatives for their employees. Therefore, the plaintiffs contend that any board member who is also a member of the hospital union would have a conflict of interest. Further, that such a board member (union representative) would have access to confidential financial information and strategy of the board. Plaintiffs point to the conflicting fiduciary duties a board member has to the hospital and to a labor organization. They also point out that a labor member could be fined, be expelled from his labor union, or have his/her retirement benefits jeopardized by not supporting labor's position.

The Court finds that Garmen pre-emption is not applicable to the Act. The Act fails to interfere with the employer and employee relationship protected by the National Labor Relations Act.

The Act provides that consumer representatives be selected on an equal proportion from four categories, one of which is organized labor. It does not require that such labor representative be affiliated with the hospital's bargaining unit to serve on the board of directors. Such labor representative could be selected from a labor organization which has no affiliation with the hospital. However, even in those instances where the labor representative on the board of directors is a member of this labor organization which represents the hospital's bargaining unit, there would not be a conflict under 29 U.S.C. 158(a) and

thus no case for pre-emption under the Belknap standards. *Belknap, Inc. v. Hale,* ____ U.S. ____, 77 L. Ed. 2d 798, 103 S.Ct. 3172 (1983).

On Page 3 of their memoranda of law (June 15, 1984), the plaintiffs cite *Anchorage Community Hospital, Inc.,* 225 NLRB 575 (1976), wherein the National Labor Relations Board held that there was no immediate danger of a conflict of interest in violation of 18(a)(2) where members of the teamsters union held positions on the hospital's board of trustees and executive committee. The plaintiffs attempt to distinguish between *Anchorage* and the present matter by arguing that the former was a voluntary association while the latter is a mandatory one. It would seem to make little difference whether labor representation was voluntary or mandatory since the crux of the issue is whether a conflict exists by a labor representative sitting on an employer's board of directors.

There is always a potential for conflict of interest with anyone who serves on the board of any corporation. There may be businessmen or vendors who do business with a hospital and who may also serve the hospital board. Like any board member who has a conflict, a labor representative sitting on a board of directors should stand aside when issues are taken up regarding his/her labor organization. Further, where a board member, whether a labor member or businessman, is placed in a position of a possible conflict of interest and breach of fiduciary responsibility then that board member should withdraw from the decision making process on that issue. The Court is of the opinion that this issue is not pre-empted by federal labor laws.

Due Process Clause

The plaintiffs argue that the Act is (1) unreasonable, arbitrary and capricious because it bears no real relationship to hospital cost containment control; (2) unreasonably and arbitrarily restricts the ability of hospitals to discharge their legal responsibility to quality as well as cost efficient health care; and

(3) takes the Sisters of the Pallottine Missionary Society's property without compensation; and (4) is vague, ambiguous, and overbroad. The Court will address these issues in the order presented.

Plaintiffs argue that the Act has no relationship to the containment of hospital costs. The Legislature passed this Act in hopes of curbing rising hospital costs. Certainly, there is a rational relationship between the operation of a hospital and its board of directors. In fact, the board of directors establish the policy and guidelines which ultimately determine the cost and quality of services to be provided by a hospital. The Legislature apparently was of the opinion that placing consumer representatives on hospital boards would allow the consumer a greater input into the overall operation of hospitals and ultimately result in closer scrutiny of financial operations. The Court gives great deference to the Legislature in this matter and is of the opinion that there is a relationship between the composition of hospital boards and the containment of hospital costs. The Court is of the opinion that it should not infringe upon the powers of the Legislature.

The next issue concerns whether the Act restricts the ability of hospitals to maintain effective governance and to discharge their legal responsibility to quality as well as cost efficient health care. Plaintiffs contend that the Act's establishment of specified percentages for consumer representation on hospital boards without regard to qualification and commitment regarding the discharge of their duties constitutes an arbitrary and unreasonable restriction in violation of the Due Process Clause of the Fourteenth Amendment. There is no reason to believe that the average consumer is not qualified to serve as a hospital board member. The ultimate decision regarding the selection of individuals to serve on hospital boards rests solely upon the hospital itself. When selecting board members the hospital may continue to use the criteria and standards for selection of board members as it has done in the past. The only difference

is that the hospital must now be sensitive to the four categories set forth in the Act. Certainly, there are individuals within those categories who would make excellent board members. In fact, testimony revealed that some members who are presently serving on hospital boards would come within one or more of the four categories set forth in the Act. The ultimate responsibility lies, as it has in the past, with the hospital to recruit and select only those individuals who would make good board members. For these reasons, the Court is of the opinion that this issue is without merit.

The plaintiffs have also raised the question of whether there is a taking of property without compensation. It is argued that there is a taking of the Sisters of the Pallottine Missionary Society's property without compensation and therefore in violation of the Due Process clause of the Fourteenth Amendment.

The Fourteenth Amendment of the United States Constitution provides that no person shall be deprived of his property without due process of law. However, it has been held that every governmental regulation of uses of private property was not a taking for public use. *Miller v. Schoene,* 276 U.S. 272, 277-80 (1928). In *Troy Ltd v. Renna,* 727 F.2d 287, 302 (1984), it was held that "regulations of the use of private property frequently involve costs to the owner. They are nevertheless not deemed to be takings." Where there is a common exercise of regulatory power then courts have tended to sustain government action. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 592-94 (1962). In *Pennsylvania Coal Co. v Mahon,* 260 U.S. 393, 413 (1922), the court held that:

> [G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase.* "Government hardly could go on if to some extent values incident to property

> could not be diminished without paying for every such change in the general law."

The court went on to indicate that "the greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Pennsylvania Coal Co. v. Mahon, supra.* A taking occurs in the ordinary sense when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413-14 (1922). *See also Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962). In *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978), the court set forth guidelines on determining when a taking has occurred:

> In engaging in these essentially ad hoc, factual inquires, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.
>
> . . . So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

The Act establishes certain guidelines or regulations for the common good in the hopes of containing health care costs. The regulated hospitals are either directly supported by the state or indirectly supported through certain tax exemptions. Irregardless of the method of financial support, non-profit and local government hospitals receive such benefits because of their commitment to public service. Clearly, the state has not appropriated or taken governing control of these hospitals.

Hospitals, and the health field in general, have been a highly regulated field. The plaintiffs were aware of that fact when they entered the hospital business. The Act challenged here is a method or attempt to regulate hospital costs.

Void for Vagueness

It has been alleged that the Act violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution because it is vague, ambiguous, and overbroad. As the Court has already stated, the Act is intended to regulate health care costs and as such is an economic regulation. Under due process a law is void if it is so vague that individuals "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Such indefiniteness violates due process when it fails to give individuals fair notice. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972).

The Act provides for four categories: small business, organized labor, elderly persons, and persons whose income is less than the national median income. Further, special consideration is to be given to women, racial minorities, and handicapped persons. Each of these terms have a common interpretation or meaning regarding which individuals would fit each category. Testimony of Bruce Carter indicated he had no problem determining who is a small business person (Tr. 278) and Sister Mary Diane Bushee had no problems with organized labor, elderly, or persons below the median income (Tr. 243). In fact, testimony revealed that certain members presently serving on hospital boards would come within these categories. Sister Bushee even testified that St. Joseph's had a contingency plan which she had reason to believe would comply with the Act. (Tr. 254) Based upon these facts the Court finds no basis for the plaintiffs' argument that the Act is vague, ambiguous, and overbroad.

Article XI of West Virginia Constitution

Plaintiffs contend that the Act violates Sections One and Four of the West Virginia Constitution. Section 1, Article XI provides:

> The legislature shall provide for the organization of all corporations hereafter to be created, by general laws, uniform as to the class to which they relate; but no corporation shall be created by special law: Provided, that nothing in this section contained, shall prevent the legislature from providing by special laws for the connection, by canal, of the waters of the Chesapeake with the Ohio river by line of the James river, Greenbrier, New river and Great Kanawha.

Plaintiffs argue that the Act imposes upon non-profit hospitals special requirements which are not uniformly applicable upon all non-profit corporations. The plaintiffs are attempting to argue that the Legislature, in passing W. Va. Code 16-5B-6a, unfairly singled them out for different treatment. Article XI of the West Virginia Constitution does not prevent the Legislature from passing laws which regulate specialized areas of business conducted by various corporations. To argue that the Legislature may not pass legislation regulating activities of certain corporations without making such regulations uniformly apply to all members of a certain class of corporations is beyond imagination. Article XI Section 1 of the West Virginia Constitution only requires uniform laws regarding the creation and incorporation of certain classes of corporation, i.e.: non-profit, profit, et cetera.

Article XI, Section 4, of the West Virginia Constitution provides:

> .... The legislature shall provide by law that every corporation, other than a banking institution, shall have power to issue one or more classes and series within classes of stock, with or without par value, with full, limited or no voting powers, and with preferences and special rights and qualifications, and that in all elections for directors or

> managers of incorporated companies, every stockholder holding stock having the right to vote for directors, shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner.

The Act does not prevent the "stockholders", Sisters of Pallottine Missionary Society, from selecting or voting for individuals they feel are capable and qualified to serve as directors. Stockholders need only to consider the four categories set forth in the Act when selecting directors but may otherwise be discriminate in choosing individuals they wish to serve on such boards.

Contracts Clause

The Contracts Clause of the United States Constitution provides that "no state shall . . . pass any . . . law impairing the obligations of contracts." A charter of a private corporation is a contract and entitled to protection under the Contracts Clause. *Dartmouth College v. Woodward,* 4 Wheat (17 US) 518, 4 L. Ed. 629 (1819). It has been further held that articles of incorporation organized and incorporated under the general laws of a state constitute a contract between the corporation and state. *Stanislaus County v. San Joaquin and Kings River Canal,* 192 U.S. 201 (1904). However, a legislature may, without impairing contractual obligations, impose new burdens upon corporations, in addition to those contained in the charger, which are in the public interest and safety. *Union Bridge Co. v. U.S.,* 204 U.S. 364 (1907). Legislation which in effect only regulates the manner in which the franchises of a corporation

are to be exercised and that do not interfere substantially with the object of the grant conferred by its charter do not impair the contract. *Pearsall v. Great Northern Railroad Co.,* 161 U.S. 646 (1896).

The Court in determining whether the Act is in conflict with the contracts clause must determine whether the law has worked a substantial impairment of the contractual relationship. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 103 S.Ct. 697, 704 (1983). In determining whether a state law seriously impairs the contract the Court must look to the nature of the business or industry.

> In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. *Allied Structural Steel Co.,* 438 U.S., at 242, n. 13, 98 S.Ct., at 2721, n. 13, citing *Veix v. Sixth Ward Bldg. & Loan Ass'n,* 310 U.S. 32, 38, 60 S.Ct. 792, 794-795, 84 L.Ed. 1061 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects; he purchased subject to further legislation upon the same topic"). The Court long ago observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter,* 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908)." *Energy Reserves,* 459 U.S. at 411, 103 S.Ct. at 705.

Clearly, the health care industry is a highly regulated field and the plaintiffs were aware of that fact when they chose to enter the hospital business. Further, the Act does not prevent the stockholders from selecting those individuals they prefer as hospital board members. The Act only provides that in selecting such board members they be sensitive to select members who may represent certain areas. The hospitals covered by the Act are charitable organizations who operate to serve the public and receive certain tax advantages.

Conclusion

Functionally speaking, in the matters here addressed, we are speaking of power. The power but not the wisdom of the legislature. The power and the right of this Court to address the constitutional questions presented.

The police power of the state is vested solely in the legislature. The same is limited only by state and federal constitutional strictures. Such were not found.

And while the Court had the power to effect judicial strictures as contended, it had no such right. In such instances, judicial restraint is dictated.

On the basis of the testimony adduced at the hearing on plaintiffs' "Motion for Preliminary Injunction", the parties respective memorandums of law and reply, the Court finds that W. Va. Code 16-5B-6a does not violate the Constitution of the United States and the Constitution of the State of West Virginia.

Judgment shall be accordingly ORDERED.

The Clerk is directed to transmit certified copies of this Opinion to all counsel of record herein.

Dated this 18th day of December, 1984.

/s/ WILLIAM M. KIDD
William M. Kidd
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.
ATTNT: E. LOWELL MARNEY
Clerk, U. S. District Court
Northern District of West Virginia

By: _____
Deputy Clerk

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF WEST VIRGINIA

AT WHEELING

AMERICAN HOSPITAL ASSOCIATION, a private, non-profit corporation; WEST VIRGINIA HOSPITAL ASSOCIATION, a private, non-profit corporation; STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY, a private, non-profit, charitable corporation; CHARLES TOWN GENERAL HOSPITAL, a private, non-profit, charitable corporation; WEIRTON MEDICAL CENTER, INC., a private, non-profit, charitable corporation; SISTERSVILLE GENERAL HOSPITAL, a city hospital; WHEELING HOSPITAL, INC., a private, non-profit, charitable corporation; and THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, private, non-profit corporation,

Plaintiffs,

v.

L. CLARK HANSBARGER, Director of the West Virginia Department of Health,

Defendant.

CIVIL ACTION NO. 84-144-C(K)

ORDER

This day came the plaintiffs and defendant, by their respective counsel, and stipulated that the trial of the action upon its merits be consolidated with plaintiffs' Motion for a

Preliminary Injunction, which was heard by the Court on July 16, and 17, 1984. The parties further stipulated that they would not present witnesses and exhibits for the trial on the merits other than those presented at the hearing on plaintiffs' Motion for a Preliminary Injunction. The parties also stipulated that all motions and memoranda filed in connection with plaintiffs' Motion for a Preliminary Injunction be submitted in support of the parties' respective positions regarding the merits of the trial of the action.

U. S. DISTRICT COURT FILED AT CLARKSBURG, W. VA., NOV. 8, 1984, E. LOWELL MARKEY, CLERK.

Thereupon, the Court having heard the statements of counsel and received the stipulation of the parties, finds that the evidence adduced at the hearing of plaintiffs' Motion for a Preliminary Injunction be considered also as the evidence of the trial of this action. It is, therefore, ORDERED that, pursuant to the stipulation of the parties, the trial of this action be and hereby is consolidated with the previous hearing on plaintiffs' Motion for a Preliminary Injunction; that the motions and memoranda filed in connection with the plaintiffs' Motion for a Preliminary Injunction be and the same hereby are submitted for the trial of this action, and that no further briefs, witnesses, or evidence be submitted in connection with the trial of this action.

ENTER:

/s/ WILLIAM M. KIDD
William M. Kidd, Judge

PRESENTED BY:

/s/ CHARLES L. WOODY
Charles L. Woody

/s/ DONALD L. DARLING
Donald L. Darling

/s/ ROBERT J. O'NEIL
Robert J. O'Neil
Counsel for Plaintiffs

/s/ WALTON AUVIL
Walton Auvil
Counsel for Defendant

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: E. LOWELL MARKEY
Clerk, U. S. District Court
Northern District of West Virginia

By: /s/ SHERIE T. MINNIE

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF WEST VIRGINIA

AMERICAN HOSPITAL ASSOCIATION, a private, non-profit corporation, WEST VIRGINIA HOSPITAL ASSOCIATION, a private, non-profit corporation, STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY, a private, non-profit, charitable corporation, CHARLES TOWN GENERAL HOSPITAL, a private, non-profit, charitable corporation, SISTERSVILLE GENERAL HOSPITAL, a city hospital, WHEELING HOSPITAL, INC., a private, non-profit, charitable corporation, and THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, a private, non-profit corporation,

Plaintiffs,

Vs.

L. CLARK HANSBARGER, Director of the West Virginia Department of Health,

Defendant.

CIVIL ACTION NO. 84-0144-C(K)

JUDGMENT ORDER

This action came on for hearing upon plaintiffs' motion for preliminary injunction, the Honorable William M. Kidd, United States District Judge, presiding, and the issues having been duly considered and a decision having been rendered,

U. S. DISTRICT COURT FILED AT CLARKSBURG, W. VA., SEP 20 1984, E. LOWELL MARKEY, CLERK.

It is ORDERED and ADJUDGED

That the Memorandum Opinion rendered in this case be filed and become a part of the record in this case.

That the plaintiffs' motion for a preliminary injunction be denied.

Dated this 19th day of September, 1984.

ENTER:

/s/ WILLIAM M. KIDD
William M. Kidd
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: E. LOWELL MARKEY
Clerk, U. S. District Court
Northern District of West Virginia

By: /s/ SHERIE T. MINNIE
Deputy Clerk

1. Jurisdiction of this Court is predicated upon 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. § 2201 that W. Va. Code § 16-5B-6a is unconstitutional and is an interference with collective bargaining rights between plaintiffs and their employees, which is an area pre-empted by federal labor law.

2. Plaintiff American Hospital Association is a private, non-profit corporation organized and existing under the laws of the State of Illinois, having and maintaining its principal office and place of business in Chicago, Illinois, and having as members thereof individual non-profit and local governmental hospitals located throughout West Virginia including plaintiffs

Stonewall Jackson Memorial Hospital Company, Charles Town General Hospital, Weirton Medical Center, Inc., Sistersville General Hospital, and Wheeling Hospital, Inc.

3. Plaintiff West Virginia Hospital Association is a private, non-profit corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business in Charleston, West Virginia, and having as members thereof individual non-profit and local governmental hospitals located throughout West Virginia including plaintiffs Stonewall Jackson Memorial Hospital Company, Charles Town General Hospital, Weirton Medical Center, Inc., Sistersville General Hospital and Wheeling Hospital, Inc.

4. Plaintiff Stonewall Jackson Memorial Hospital Company is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Weston, West Virginia, and owns and operates a seventy (70) bed hospital located in Weston, West Virginia.

5. Plaintiff Charles Town General Hospital is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Ranson, West Virginia, and owns and operates a one hundred fourteen (114) bed hospital, known as Jefferson Memorial Hospital, located in Ranson, West Virginia.

6. Plaintiff Weirton Medical Center, Inc. is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Weirton, West Virginia, and owns and operates a two hundred sixty-five (265) bed hospital located in Weirton, West Virginia.

7. Plaintiff Sistersville General Hospital is a local governmental hospital organized and existing under the laws of the

State of West Virginia and the ordinances of the City of Sistersville, having and maintaining its principal office and place of business at Sistersville, West Virginia, and owns and operates a thirty-two (32) bed hospital located in Sistersville, West Virginia.

8. Plaintiff Wheeling Hospital, Inc. is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Wheeling, West Virginia, and owns and operates a two hundred seventy-six (276) bed hospital located in Wheeling, West Virginia.

9. Plaintiff The Catholic Health Association of the United States is a private, non-profit corporation organized and existing under the laws of the State of Missouri, having and maintaining its principal office and place of business in St. Louis, Missouri, and having as members thereof religious institutes, more commonly referred to as religious orders of nuns, which own, operate and sponsor certain non-profit hospitals located throughout West Virginia and which appoint the respective directors of said hospitals.

10. Defendant L. Clark Hansbarger is the Director of the West Virginia Department of Health and in such capacity is one of the individuals who may enforce the provisions of W. Va. Code § 16-5B-61.

11. Code 16-5B-6a is enforceable by injunction obtained in an action at law authorized by Code 16-5B-6a(d).

12. During its 1983 regular session the West Virginia Legislature enacted Section 6a of Article 5B of Chapter 16 of the Code of West Virginia of 1931, as amended, and provided it was to be effective as of July 1, 1984.

13. During the 1984 regular session of the West Virginia Legislature, separate bills were introduced in the House of Delegates (H.B. 1805) and the Senate (Senate Bill No. 556) to

repeal Section 6a of Article 5B in its entirety, which bills were unsuccessful, thereby leaving intact its effective date of July 1, 1984.

14. W. Va. Code § 16-5B-6a requires that on or before July 1, 1984, at least forty percent (40%) of the board of directors of all non-profit and local governmental hospitals located in West Virginia must be composed of an equal proportion of "consumer representatives" from "[s]mall businesses, organized labor, elderly persons, and persons whose income is less than the national median income" and that "[s]pecial consideration shall be made to select women, racial minorities and handicapped persons" for such positions and authorizes defendant Hansbarger and private citizens to enforce its provisions. The entire text of W. Va. Code § 16-5B-6a is as follows:

> (a) The legislature declares that a crisis in health care costs exists, and that one important approach to deal with this crisis is to have widespread citizen participation in hospital decision-making, and that many hospitals in West Virginia exclude from their boards important categories of consumers, including small businesses, organized labor, elderly persons and lower-income consumers. The legislature further declares that non-profit hospitals receive such major revenue from public sources and are so crucial in health planning and development that it is necessary to require consumer representatives on their boards of directors. Therefore, the legislature determines that non-profit hospitals and hospitals owned by local governments should have boards of directors representative of the communities they serve.
>
> (b) As used in this section, "applicable hospitals" means all non-profit hospitals and all hospitals owned by a county, city or other political subdivision of the State of West Virginia.
>
> (c) At least 40 percent of the boards of directors of applicable hospitals shall, on or before the first day of July, 1984, be composed of an equal proportion of consumer

representatives from each of the following four categories: Small businesses, organized labor, elderly persons and persons whose income is less than the national median income. Special consideration shall be made to select women, racial minorities and handicapped persons.

(d) The provisions of this section may be enforced by the director of health, or by any citizen of the county wherein any offending hospital is located, by the filing of an action at law in the circuit court of such county.

15. W. Va. Code 16-5B-6a(d) provides:

> The provisions of this section may be enforced by the director of health, or by any citizen of the county wherein any offending hospital is located, by the filing of an action at law in the circuit court of such county.

The Court finds that the Legislature's intent was to give the Director of Health or any citizen of such county the authority to seek injunctive relief against any offending hospital for violation of this section.

16. The Court finds that there is no conflict between W. Va. Code § 16-5B-6a(d), and W. Va. Code § 16-5B-11, and W. Va. Code § 16-5B-(1). W. Va. Code § 16-5B-11 provides that any person, association, corporation or local governmental agency violating W. Va. Code § 16-5B-6a shall be fined up to five hundred dollars ($500) or imprisoned for up to ninety (90) days or both. W. Va. Code § 16-5B-6(1) authorizes defendant Hansbarger in his capacity as Director of the West Virginia Department of Health to suspend or revoke the license of a non-profit or local governmental hospital for violation of W. Va. Code § 16-5B-6a.

17. No administrative rules and regulations have been promulgated to implement, administer, or interpret W. Va. Code § 16-5B-6a.

18. Plaintiffs Stonewall Jackson Memorial Hospital Company, Charles Town General Hospital, Weirton Medical Cen-

ter, Inc., Sistersville General Hospital, and Wheeling Hospital, Inc., are subject to the provisions of W. Va. Code §§ 16-5B-6a, 16-5B-11, and 16-5B-6(1) by virtue of being non-profit hospitals located in West Virginia.

19. Certain members of plaintiffs American Hospital Association and West Virginia Hospital Association are subject to the provisions of W. Va. Code §§ 16-5B-6a, 16-5B-11, and 6-5B-61 by virtue of being non-profit or local governmental hospitals located in West Virginia.

20. Certain members of plaintiff The Catholic Health Association of the United States are subject to the provisions of W. Va. Code §§ 16-5B-6a, 16-5B-11, and 16-5B-6(1) by virtue of being religious orders which own, operate, and sponsor non-profit hospitals located in West Virginia.

21. Certain members of plaintiff West Virginia Hospital association are subject to the provisions of W. Va. Code §§ 16-5B-6a, 16-5B-11, and 16-5B-6(1) by virtue of being non-profit and local governmental hospitals located in West Virginia.

22. The Court finds the following witnesses qualified as experts: Richard P. Moses (an expert on the roles and qualifications for directors on a board of directors); University of Virginia Professor Stanley D. Henderson (expert on federal labor law); G. Roger King (expert on labor relations in the health care field); Sister Mary Roch Rocklage (expert on the religious mission of a Roman Catholic religious order which owns and sponsors a hospital); Sister Margaret Mary Modde (expert on the Code of Canon Law of Roman Catholic Church); Paul E. Mullen (expert on hospital accreditation and federal Medicare programs); and Deborah S. Kolb (expert on health care planning and finance).

23. The Court finds from the testimony of Sister Diane Bushee, Major Superior of North America and Provincial Superior for the Sisters of the Pallottine Missionary Society, that the religious order owns St. Joseph's Hospital of Buckhannon;

that the present bylaws of the Sisters of the Pallottine Missionary Society, a West Virginia non-profit corporation, require that 70% of the board of directors, called the Provincial Council, be composed of members of the religious society; that the religious mission of St. Joseph's Hospital of Buckhannon, like the Sisters of the Pallottine Missionary Society, is to render care to the sick and poor in accordance with the examples set by Jesus Christ and St. Vincent Pallotti and the tenets of the Roman Catholic Church. St. Joseph's Hospital of Buckhannon is not a corporation separate from the Sisters of the Pallottine Missionary Society, but rather is the property of the Sisters of the Pallottine Missionary Society. St. Joseph's Hospital of Buckhannon nonetheless has its own "board of directors." The Provincial Council of the Sisters of the Pallottine Missionary Society appoints all of the members of such board of directors, and has the power to approve or disapprove the major actions of such board of directors. In order to ensure that St. Joseph's Hospital of Buckhannon remains devoted to its religious mission, the Provincial Council appoints to the board of directors of St. Joseph's Hospital of Buckhannon only persons who are devoted to such mission. The current bylaws of such board of directors specifically require that at least seventy percent (70%) of such board of directors must be members of the Sisters of the Pallottine Missionary Society.

The Court finds the Sisters of the Pallottine Missionary Society have a contingency plan to place representatives of special interest groups—"consumer representatives from ... small businesses, organized labor, elderly persons, and persons whose income is less than the national median income"—on the board of directors of St. Joseph's Hospital of Buckhannon; that presently all members of the board of directors of the Sisters of the Pallottine Missionary are members of the religious order; that St. Joseph's Hospital of Buckhannon is a division of the religious order; that seven members of the religious community, which serve on the board of directors for St. Joseph's Hospital

of Buckhannon and the Sisters of the Pallottine Missionary Society, have income below any definition of national median income; that the purpose of the Sisters of the Pallottine Missionary Society is to render care to the sick and poor in accordance with the example set by Jesus Christ and the tenets of the Roman Catholic Church.

24. Each of the witnesses presented by the plaintiffs, with the single exception of Professor Stanley Henderson, was directly interested in the outcome of this litigation, as they were either officials or members of plaintiff organizations (Tr. 35-36, Moses)(Tr. 202, Rocklage)(Tr. 231, Bushee)(Tr. 258-259, Mode)(Tr. 264, Carter)(Tr. 285, Mullen) or had strong pecuniary ties to the plaintiffs. (Tr. 135-136, King; Tr. 308, Kolb.)

25. The testimony of Professor Stanley D. Henderson and Roger King, Esquire, was essentially legal argument and was entitled to little, if any, probative weight on the ultimate issue of the legality of W. Va. Code 16-5B-6a under federal labor laws.

26. Code 16-5B-6a had been enacted for one year and one-half before plaintiffs attempted to challenge the law. At no time had any of the plaintiffs sought clarifications from the Department of Health regarding the meaning or effect of this legislation. (*See, e.g.*, Tr. 275-276.) "If the plaintiffs were indeed as concerned with the effects arising from the implementation as they allege, they certainly would have come before this Court at an earlier period." Memorandum Opinion and Order, p. 5. Plaintiffs have failed to show irreparable injury from the operation of Code 16-5B-6a.

Conclusions of Law

This is a case of first impression since no other state has passed a statute similar to West Virginia Code 16-5B-6a. There is no case law to guide the Court with respect to the identical issues raised by the plaintiffs.

The settled principles which govern consideration on whether a preliminary injunction should issue, pursuant to Rule 65(a) in this circuit have been enumerated in *Blackwelder Furniture Company of Statesville, Inc. v. Seilig Manufacturing Company, Inc.*, 550 F.2d 189 (4th Cir. 1977). In *Blackwelder* the court held that the court must "balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant."

> The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success. Always, of course, the public interest should be considered.

Blackwelder v. Seilig, supra.

The Court in determining whether to issue a preliminary injunction must balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant. *Blackwelder v. Seilig, supra.* In this instance plaintiffs allege that they will be irreparably injured unless the Director of Health is restrained from enforcing this statute. Plaintiffs argue that criminal charges could be brought against them pursuant to W. Va. Code § 16-5B-11, and that they could also have their license to operate a hospital suspended pursuant to W. Va. Code § 16-5B-11. However, testimony by plaintiffs' witnesses contradicts this assertion. *See e.g.,* Tr. 251-252. Indeed, testimony revealed that certain of the plaintiffs have a contingency plan to implement the requirements of this statute. Evidence reveals that the Department of Health has not disapproved any proposed board nor taken any administrative, civil, or criminal action against anyone. W. Va. Code § 16-5B-6a was passed during the 1983 regular session of the West Virginia Legislature and became effective as of July 1, 1984. During the one year period between passage of this legislation

and its effective date the plaintiffs did not attempt to challenge its constitutionality. The State of West Virginia has an interest in seeing that its laws are implemented without interruption. If this Court were to grant the requested relief, the State would be harmed in that it would prevent the orderly implementation of this statute. Further, there has been no showing by the plaintiffs that harm would result from representatives of the community serving on hospital boards. Indeed, no showing has been made that such individuals are less capable of managing the affairs of hospitals.

The Court is of the opinion that the plaintiffs have failed to show that any irreparable harm would result from implementation of W. Va. Code § 16-5B-6a.

The plaintiffs argue that the statute as presently written is vague and they are not certain how to comply with the law. In fact, Mr. Bruce Carter did not seem to have a problem defining small business (Tr. 278) nor did Sister Mary Diane Bushee have difficulty defining those individuals below the median income, organized labor, and elderly (Tr. 243). Sister Mary Diane testified that the Sisters of Pallottine had developed a contingency plan to comply with the law and that she believed that the plan would meet the requirements of the statute (Tr. 254). The Court is of the opinion that the plaintiffs have failed to raise serious questions of law regarding the Constitutionality of W. Va. Code § 16-5B-6a.

For reasons stated herein the Court hereby DENIES plaintiffs' motion for a preliminary injunction. It is so ORDERED.

Judgment shall be rendered accordingly.

The Clerk is directed to transmit certified copies of this Memorandum Opinion to counsel of record herein.

/s/ WILLIAM M. KIDD
William M. Kidd
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: E. LOWELL MARKEY
Clerk, U. S. District Court
Northern District of West Virginia

By: /s/ SHEREE T. MINNIY
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF WEST VIRGINIA

AMERICAN HOSPITAL ASSOCIATION, a private, non-profit corporation, WEST VIRGINIA HOSPITAL ASSOCIATION, a private, non-profit corporation, STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY, a private, non-profit, charitable corporation, CHARLES TOWN GENERAL HOSPITAL, a private, non-profit, charitable corporation, WEIRTON MEDICAL CENTER, INC., a private, non-profit, charitable corporation, SISTERSVILLE GENERAL HOSPITAL, a city hospital, WHEELING HOSPITAL, INC., a private, non-profit charitable corporation, and THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, a private, non-profit corporation,

Plaintiffs,

Vs.

L. CLARK HANSBARGER, Director of the West Virginia Department of Health,

Defendant.

CIVIL ACTION NO. 84-0144-C(K)

MEMORANDUM OPINION AND ORDER

On June 24, 1984, came the American Hospital Association, the West Virginia Hospital Association, Stonewall Jackson Memorial Hospital, Charles Town General Hospital, Weir-

ton Medical Center, Inc., Sistersville General Hospital, Wheeling Hospital and The Catholic Health Association of the United States, hereinafter referred to as plaintiffs, and the defendant, L. Clark Hansbarger, Director of the West Virginia Department of Health, by Donald L. Darling, Assistant Attorney General of West Virginia, for a hearing upon plaintiffs' motion for a temporary restraining order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.

U.S. DISTRICT COURT, FILES AT CLARKSBURG, W. VA., JUN 26 1984, E. LOWELL MARKEY, CLERK.

Jurisdiction for this matter is based upon Title 28 United States Code, Section 1331, a federal question, and Title 28, United States Code, Section 1343, civil rights.

The West Virginia Consumer Federation, by their counsel, Charles G. Brown, filed their motion, pursuant to Rule 24(a) and (b) and Rule 5 of the Federal Rules of Civil Procedure, to intervene as a party defendant in this action. The Court heard argument from the parties regarding this motion and took the same under advisement.

L. Clark Hansbarger, Director of the West Virginia Department of Health, by and through his counsel, Donald L. Darling, moved the Court, pursuant to Title 28, United States Code, Section 1391, to dismiss this action for lack of proper venue or in the alternative to transfer this action, pursuant to Title 28, United States Code, Section 1404, to the United States District Court for the Southern District of West Virginia. The parties to this action agreed that jurisdiction was not based upon diversity of citizenship since some of the plaintiffs and the defendant are residents of the State of Virginia. Therefore, pursuant to Rule 1391(b), any action "not found solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose." Here, even though the law in question and the health

program is administered in the Southern Judicial District, the effect felt by the plaintiffs was in the Northern District and the injury to the plaintiffs occurred in the Northern District. *Sanchez v. Pingree,* 494 F. Supp. 68 (DC Fla. 1980). Further, the claims in question have substantial contacts with, and a close relationship to, both the Northern and Southern Districts of West Virginia. *Chessman v. Carey,* 485 F. Supp. 203 (DC NY 1980). Further, the defendant maintains offices in both districts and any injuries or claims the plaintiffs allege occurred within the Northern District. Therefore, the Court is of the opinion that proper venue lies in the Northern Judicial District of West Virginia and hereby DENIES the defendant's motion to dismiss or transfer this action.

The Court also heard oral argument on whether a temporary restraining order should be issued in this matter. In determining whether to issue a temporary restraining order the Court must look to whether there has been a showing of necessity, whether irreparable injury will result if such relief is not granted, and the liklihood that the plaintiffs' probability of success upon the merits. *Westinghouse Broadcasting Co. v. Dukakis,* 409 F. Supp. 895 (DC Mass. 1976). The issuance of a temporary restraining order is a drastic remedy which normally should not issue unless a very strong showing has been made of its necessity. *Inter-Collegiate Press, Inc. v. Myers,* 519 F. Supp. 765, (DC Kan. 1981). The issuance of a temporary restraining order is left to the sound direction of the court. *Gerber v. Seamans,* 332 F. Supp. 1187 (DC NY 1971).

In this instance, the statute which plaintiffs allege infringes upon their constitutional rights was passed during the 1983 session of the West Virginia Legislature. However, the State Legislature provided that Chapter 16, Article 5B, Section 6a not take effect until July 1, 1984. Plaintiffs were aware that this legislation had passed and that it would take effect on July 1, 1984. However, the plaintiffs made no attempt to bring this matter before the Court until five days prior to the law's

implementation. Further, it was revealed during oral argument that the plaintiffs only casually, if at all, brought their concerns to the attention of the defendant. Indeed, plaintiffs indicated during argument that no written correspondence or records were directed to the defendant regarding their concerns and whatever expressions of concern made known to the defendant were made orally. If the plaintiffs were indeed as concerned with the effects arising from the implementation of this legislation as they allege, they certainly would have come before this Court at an earlier period. Instead, the plaintiffs now seek this Court's injunctive relief only five days prior to the law in question taking effect.

The Court is of the opinion that the plaintiffs have failed to meet the required standards of necessity and a showing of irreparable injury. Further, while the Court cannot say without a doubt that plaintiffs will not be successful upon the merits, certainly the plaintiffs have failed to make a strong showing and further the Court is of the opinion that the plaintiffs have not exercised the diligence that equity and good conscience demand in a situation of this nature. Therefore, based upon the hearing held in this matter and the memoranda of law and pleadings, the Court is of the opinion that plaintiffs' motion for a temporary restraining order should be, and is hereby DENIED.

It is further ORDERED that the Clerk of this Court send certified copies of the Memorandum Opinion and Order to counsel of record herein.

ENTER:

/s/ WILLIAM M. KIDD
William M. Kidd
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: E. LOWELL MARKEY
Clerk, U. S. District Court
Northern District of West Virginia
By: /s/ DIANA L. BEDELL
Deputy Clerk

APPENDIX F

WEST VIRGINIA CODE § 16-5B-6. STATE DIRECTOR OF HEALTH TO ISSUE LICENSES; SUSPENSION OR REVOCATION.

The state director of health is hereby authorized to issue licenses for the operation of ambulatory health care facilities, ambulatory surgical facilities, hospitals or extended care facilities operated in connection with hospitals, which are found to comply with the provisions of this article and with all regulations lawfully promulgated by the department.

The state director of health is hereby authorized to suspend or revoke a license issued hereunder, on any of the following grounds:

(1) Violation of any of the provisions of this article or the rules and regulations issued pursuant thereto; . . . .

* * *

If a license is revoked as herein provided, a new application for a license shall be considered by the director of health if, when, and after the conditions upon which revocation was based have been corrected and evidence of this fact has been furnished. A new license shall then be granted after proper inspection has been made and all provision of this article and rules and regulations promulgated hereunder have been satisfied.

* * *

WEST VIRGINIA CODE § 16-5B-6a. CONSUMER MAJORITIES ON HOSPITAL BOARDS OF DIRECTORS

(a) The legislature declares that a crisis in health care costs exists, that one important approach to deal with this crisis is to have widespread citizen participation in hospital decision making and that many hospitals in West Virginia exclude from their

boards important categories of consumers, including small businesses, organized labor, elderly persons and lower-income consumers. The legislature further declares that nonprofit hospitals receive such major revenue from public sources and are so crucial in health planning and development that it is necessary to require consumer representatives on their boards of directors. Therefore, the legislature determines that nonprofit hospitals and hospitals owned by local governments should have boards of directors representative of the communities they serve.

(b) As used in this section, "applicable hospitals" means all nonprofit hospitals and all hospitals owned by a county, city or other political subdivision of the State of West Virginia.

(c) At least forty percent of the boards of directors of applicable hospitals shall, on or before the first day of July, one thousand nine hundred eighty four, be composed of an equal proportion of consumer representatives from each of the following four categories: Small businesses, organized labor, elderly persons and persons whose income is less than the national median income. Special consideration shall be made to select women, racial minorities and handicapped persons.

(d) The provisions of this section may be enforced by the director of health, or any citizen of the county wherein any offending hospital is located, by the filing of an action at law in the circuit court of such county.

WEST VIRGINIA CODE § 16-5B-11. VIOLATIONS; PENALTIES

Any person, partnership, association or corporation, and any local governmental unit or any division, department, board or agency thereof establishing, conducting, managing or operating an ambulatory health care facility, ambulatory surgical facility, a hospital, or extended care facility operated in connection with a hospital, without first obtaining a license therefor

as herein provided, or violating any provision of this article or any rule or regulation lawfully promulgated thereunder, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished for the first offense by a fine of not more than one hundred dollars, or by imprisonment in the county jail for a period of not more than ninety days, or by both such fine and imprisonment, in the discretion of the court. For each subsequent offense the fine may be increased to not more than five hundred dollars, with imprisonment in the county jail for a period of not more than ninety days, or both such fine and imprisonment, in the discretion of the court. Each day of a continuing violation after conviction shall be considered a separate offense.

APPENDIX G

JOINT APPENDIX BEFORE FOURTH CIRCUIT

Testimony of Deborah Kolb, Amherst Associates, Vice-President and Manager of Consulting Services for Southeast Region, qualified as an expert on health finance and planning.

American Hospital Association, *Guidelines: Identification, Selection and Orientation of New Hospital Trustees* (1977)

American Hospital Association, *Guidelines: Role and Functions of the Hospital Governing Board* (1982)

St. Joseph's Hospital and Nursing Care Facility, *Bylaws of the Governing Board*

Deborah Kolb

Q. Would it be correct to state that between Medicare, Medicaid, and the controls of the West Virginia Health Care Cost Review Authority, that the costs of all patients in the acute care hospitals in West Virginia are subject to existing control mechanisms?

A. Certainly the charges are.. the hospital would be at risk if it costs outran those charges, certainly.

Q. To what extent do these federal and state government mechanisms control the rate of increase in hospital rates in West Virginia?

A. Well, obviously for the federal funds that is determined by the price that is set for each diagnosis. In fact, I believe that for the upcoming fiscal year that rate of increase is going to be approximately five percent. The Health Care Cost Review Authority has the power to set its inflation rate that it will allow, so that is totally controlled by the state.

Q. In the course of your preparation for testimony here today, have you specifically had the occasion to conduct a study

as to how West Virginia hospital costs and charges compare to national averages?

A. Yes, I have.

Q. Would you please relate how that study was conducted and how you constructed it?

A. Well, there is several factors that we looked at, the first being charges, because hospitals charges represent the direct cost that somebody is going to put forth to receive the services. The most common element is the semi-private room rate, and that's the element I guess most of us are familiar with when we go to a hospital, and for that data compiled by the Health Insurance of America was reviewed. The last few years that organization, which is a group of health insurers nationwide, that organization has gathered information on sample room rates for all the states in the US. In that comparison, the West Virginia rates over the last three years for which the studies have been conducted, West Virginia has been consistently lower than the US average, and lower than most other states. I think, in fact, the most recent study was July of 1983, and at that time West Virginia's average room rate was $162.00 compared to the US rate of $195.00. This put West Virginia the eighteenth lowest state in the nation for room rates. This has been a consistent pattern for all of these studies. Room rates, though, are not fully reflective obviously of all the charges that you get when you go to the hospital, so we also looked at the average charges for an admission to a hospital in West Virginia, compared to those for admission to hospitals nationwide, and to do this we looked at data compiled by the American Hospital Association in its work entitled Hospital Statistics. This is a commonly available document used by hospitals.

In these four years, West Virginia, from 1979 through 1982 was consistently lower than the US average, or for its region, and the American Hospital Association has hospitals assigned to different census regions, so that West Virginia is consistently

lower than the southeastern region. In fact, in 1982, which is the most current available data, West Virginia averaged $2,401.00 per admission, versus the US average of $3,004.00, and the southeastern average of $2,778.00. This meant that West Virginia was approximately twenty percent below the US average and approximately fifteen percent below the southeastern average. And that pattern, too, held for the four years that we had complete information for.

On a per day basis which means the average charge that a patient would incur for each day that he or she was in the hospital, West Virginia was also consistently lower. In fact, in 1982 again West Virginia was $333.00 compared to the US average of $390.00, and the regional average of $370.00. In addition to looking at the differences in charges, we looked at the differences in hospital costs, that means costs to the hospitals for their expenses. Again, we utilized American Hospital Association data for hospitals, and we looked at the in patient expenses per in patient admission. The same pattern is apparent as we saw on the revenue side. In fact, West Virginia for 1982 was twenty-two percent lower than the US average, and fourteen percent lower than the southeastern average. In terms of dollars, this meant that West Virginia was $1,948.00 per admission, and the US average was $2,500.00 per admission. Overall West Virginia is the eleventh lowest state in terms of costs per admission in the country, and it has been for quite a few years now. It has retained that relative low position relative to the other states.

If you look at it again on terms of a per day basis, versus a per admission basis, again West Virginia is seventeen percent lower than the US in 1982, and ten percent lower than the southeast region in 1982. The numbers for West Virginia in 1982 were $271.00 expense per day versus the US of $327.00 per day. Over all we know that expenditures per capita in West Virginia for hospital care are lower than per capita in the US on the whole.

American Hospital Association

Guidelines

Identification, Selection, and Orientation of New Hospital Trustees

This guideline document is intended to provide general advice to the membership of the American Hospital Association, as approved by the General Council.

Introduction

Hospital trusteeship has changed dramatically over the past decade. Today, trustees are selected for their particular expertise and not for their philanthropic support of the institution. Environmental factors have necessitated greater commitment of time and talents.

The historic dependance on philanthropy has given way to a significant concern for preserving the assets of the institution, particularly as a result of the complexities and uncertainties of payment by third-party payers for services provided to their beneficiaries. The board's legal authority and moral responsi-

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These guidelines were developed by the American Hospital Association's Committee on Hospital Governing Boards to assist the hospital in filling a vacancy on the hospital's governing board. The guidelines touch on several important areas, and it is the committee's intention to prepare more specific guidelines and suggested procedures that will help the hospital to improve the board's effectiveness as well as the individual trustee's understanding of his role and functions. This document was approved by the Association's House of Delegates on February 2, 1977, and reaffirmed with slight modifications by the General Council on October 12-13, 1983.

©1977 by the American Hospital Association, 840 N. Lake Shore Dr., Chicago, IL 60611. Printed in the U.S.A. All rights reserved. Catalog No. 196726. 15M-4/77-5633.5M-8/77-5827.5M-8/78-6326.3M-5/81-7567.3M-12/83-1078.

bility for ensuring the high quality of health care provided within the hospital have now been defined more specifically. Also, the increased activity of labor unions and organized professional associations in the hospital field now demands sound personnel policies and a better understanding of labor-management relations. Finally, the federal government has become the largest single purchaser of health care services, and it is using this marketplace advantage to ensure a maximum return on its huge, but nonetheless limited, expenditure of resources.

It is essential, therefore, that the governing board, the institution's legally responsible corporate entity, fully understand the challenges facing it today and that it make a commitment to surmount these challenges by organizing itself effectively and keeping itself fully informed on all issues. Only by doing so can it retain its ability to determine the organization's capabilities and its future.

Governing board self-evaluation

The board's primary functions are policy formulation and monitoring. The board determines the role of the hospital and represents a review body for the hospital's administration as the administration works to fulfill this role. While recognizing management's responsibility for day-to-day operations, the board is ultimately responsible for the management of the institution and is available for advice and counsel. Another monitoring function is the responsibility for ensuring sound management and, if necessary, the replacement of a failing one. Again, this responsibility demands familiarity with hospital operations and a strong board that is willing to make difficult decisions in a timely manner.

The board has another prominent role, namely, public and community relations. Hospital trustees have a prime responsibility to listen, as well as to speak, to the institution's various

publics. Trustees have a special duty to strive for a mutual understanding between the institution and the constituency it serves, including the community's elected public officials.

When formulating governing policies, hospital boards, like other governing boards, must represent the best interests of the institution over the long term. It is therefore essential that the institution have a written plan extending at least three years into the future. It is the planning function that guides the institution toward its stated objectives and that ultimately influences all policy decisions.

Adding a new member to a hospital board is a significant event not only for the individual but for the board itself. Each new member represents a new influence, a new ingredient, that must be blended into the existing structure and that is bound to have its own lasting effect. Before subjecting itself to any such significant change, it would be well for the board to conduct its own self-analysis and answer a few important questions: Given the hospital's present circumstances, what would be the most desirable composition if an entirely new governing board were formed? Which factors are present by virtue of existing members and which should be sought in new members? Have the current members performed adequately, or is it time to replace someone? Has the role of the institution been altered sufficiently or have new outside influences developed since the last self-evaluation to demand that additional factors now be considered? By conducting such a self-analysis before considering specific individuals as candidates, the hospital board will be better able to determine who would be best for the institution and, conversely, who would receive the most personal satisfaction from this kind of community service.

Identification

Although there are no absolute rules for determining who should serve on a hospital's governing board, there are several helpful considerations. Most would agree that the governance

of our social institutions should be entrusted to individuals of high moral character who display such personal traits as strong commitment, intelligence, integrity, courage, a capacity for compromise, and a capacity for growth. It is most important that the board select individuals who not only have these qualities but who also will commit long hours of service over many years. It is essential that trustees be willing to devote the amount of time necessary to become educated in the complexities of hospital operations and to recognize the need for their continuing education. In making such a commitment, trustees should understand fully the board's responsibility to evaluate each board member and to replace any nonproductive member. A fair, equitable process for doing so should exist.

In filling vacancies on the board, the hospital should continually seek to attract young people who, early in life, have demonstrated leadership and a particular expertise. The hospital stands to benefit over the years by continuously mixing such individuals, who have a maximum number of creative years ahead of them, with more experienced board incumbents. Many hospitals have trustees serve for a specified term and then, after an evaluation, reelect the trustee or seek a new person depending on the result of that evaluation. Over the course of time, a sense of continuity should be established as a result of this process.

It is most desirable to achieve a blend of constituent elements, that is, to achieve balanced community representation through the selection of residents from the hospital's service area whenever possible. However, board members should not be selected as representatives of special interest groups. Rather, a mix of several kinds of expertise is desirable.*

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* In its guidelines entitled *Role and Functions of the Hospital Governing Board,* the American Hospital Association has endorsed board membership for physicians and hospital administrators.

The board's need for members who are able to articulate the hospital's positions to those actively involved in the political process must not be underestimated. The current level of government involvement in health affairs demands effective legislative relations.

It would be helpful if new or prospective board members already were familiar with the hospital and its current concerns. Many hospitals have benefited by selecting new board members from the advisory boards and the auxiliary that serve the hospital in voluntary capacities and whose members therefore keep abreast of developments affecting the hospital. If an institution is unable to maintain a separate advisory board through which it can involve many community leaders and representatives, some of these potential board members may prove effective members of various board committees. Effective committees are where the issues are often laid bare; effective decisions are made; and the work is frequently more educational, exciting, and rewarding than the policy actions that take place at the board level.

Selection

It is recommended that the prospective trustee be approached by a member of the board and the administrator in person, at the request of the board or its selection committee. It is helpful to have the invitation extended by the person most likely to receive the desired favorable response. In any event, the first meeting is crucial because the educational process for the new trustee begins with the invitation. If the candidate is relatively unfamiliar with the hospital, his first impressions are even more important. The meeting should occur in an atmosphere that is conducive to a relaxed and candid discussion of the opportunity being offered and the responsibilities concomitant with acceptance of the position.

Having taken a thorough look at the institution's needs and the individual chosen to best fill those needs, the board should

expect that the prospective trustee will want to take an equally thorough look at the institution. Although it is a recognized privilege and a serious responsibility to serve as a hospital trustee, the board should appreciate, and the hospital will utimately benefit from, an individual's desire to understand better that which he is being asked to undertake. It is suggested that the candidate be informed of the hospital's purpose, its goals and objectives, its major accomplishments and its current problems, the particular role to be filled, and the reason the individual has been approached to fill that role. The hospital should be prepared to discuss its financial status, long-range plans, relationships with the medical staff and the community, personnel policies, and so forth.

Having discussed thoroughly the possibility of serving as a trustee, the board must be almost as appreciative of a negative response as a positive one. Having made a fully informed decision, the individual has spared both parties the difficulties engendered by an ineffective or uninterested board member. Moreover, even if the institution has not succeeded in attracting the individual's service, it may have accomplished the next best thing—it has informed one more identified community leader as to the nature of the institution, the services it provides, and the difficulties it encounters in providing those services.

When a prospective trustee accepts the institution's offer and agrees to an appropriate interview and written disclosure to ensure against any conflict of interest, the formal appointment should follow as soon as possible in order to maintain the enthusiasm of both parties to get to know each other better.

Orientation

When the new trustee has been appointed, the board must take the necessary steps to expand on the initial, exploratory interview in order to ensure full understanding of certain essential points.

Responsibilities

As already mentioned, the appointee must realize what it is to be a hospital trustee. It is substantially more than a simple appointment to give social recognition. The new board member must comprehend the trust placed in the board by everyone who depends on the hospital for a vital community service. The potential effect on the welfare of the community of each decision made by a trustee could possibly outweigh the effect of any decision he would make in private business.

Decisions

The new trustee must understand that these decisions, made in the best interest of the institution, can have a profound effect on his life as a private citizen. What are the implications for a trustee who, in trying to defeat a union organizing drive at the hospital, alienates the union employees in his private business? Or for an individual who supports the closing for financial reasons of a certain facility when the community is striving to keep it open? The implications are endless, and each trustee should be made aware of their potential impact.

Programs versus financial constraints

The trustee must appreciate the natural competition that exists within the institution. When funds are limited—and all indications point toward continued fiscal constraints on hospitals in the near future—the trustee must recognize that each decision could, and probably will, upset at least one group within the hospital. Physicians, who see the need for the latest facilities and equipment in order to maintain the highest level of patient care, may not fully appreciate the financial implications for the institution as a whole or the outside regulatory limitations placed on institutional discretion. The same can hold true for other professional groups and, to some extent, the balance of employees as well. It is therefore essential that, through the chief executive officer, the board maintain open

channels of communication with the medical staff and key administrative and supervisory personnel in an attempt to gain a greater understanding of and appreciation for their difficult decisions.

Formal orientation

The orientation process is also a socialization process, beginning with the invitation to serve and continuing throughout the tenure on the board. It may be advisable to begin the formal process with a meeting attended by the newcomer, the chairman, the hospital's chief executive officer, and the chief of the medical staff. It may be best to meet with all new trustees at once so that the inquiries of one can stimulate the curiosity of the others. Many hospitals begin immediately with formal orientation sessions, whereas others wait a few weeks or months in order to give the individual some background on which to raise more precise questions.

Informal orientation

The orientation process might be accomplished most effectively by assigning each new trustee a sponsor or preceptor from the ranks of the existing board. It may be useful for the new trustee to have one person serve as a reference and source of information with whom the learning experience can be shared. Furthermore, this arrangement is an ideal means of continuing education for the sponsor.

Finally, it may be wise to gather all trustees in an informal, social setting so that they all can become better acquainted, appreciate more fully each individual's interests and capabilities, and generally foster a better understanding and sense of compatibility among one another.

Regardless of the approach chosen, the responsibility for coordinating the orientation should lie with the chief executive officer. The final step in the formal orientation process is to

acquaint the trustee with the appropriate institutional documents, established policies, external relationships, as well as the physical plant. Among the many possible matters that need to be brought to the trustee's attention for review are:

- Institutional charter, bylaws, and regulations, as well as a brief history of the institution
- Organizational structure of the board and the medical staff
- Extent of liability coverage, if any, for governing board members
- Medical staff bylaws and regulations
- Governing board's relationship with the medical staff and the administration
- Hospital's relationships with government and third-party payers
- Functions, services, and relationships of the local, state, and national hospital associations
- Short-range and long-range planning documents, including a statement of the hospital's goals and objectives
- Description of all services provided by the hospital, other health care services available in the hospital's service area, and relationships with other providers
- Most recent budget, financial statement, and rate structure
- Research and educational programs
- Formal public and community relations programs, including the development program if there is one
- Personnel policies and the provisions of all union contracts
- Most recent survey report of the Joint Commission on Accreditation of Hospitals, if the institution has sought accreditation

- Hospital organization chart
- Previous minutes of the board and its committees, the organized medical staff and its committees, and the auxiliary
- A directory of persons, with phone numbers, who should be known to the trustee, and spouses' names may also be useful

This list should be supplemented according to the institution's specific circumstances.

Conclusion

A fully informed and well-organized hospital board of trustees is absolutely essential to the growth and protection of the institution.

The demand for public accountability has risen greatly in recent years as has the counterbalancing necessity for developing a hospital's own legislative and community relations spokesmen. The board is the institutions's primary link to the public and this, together with guiding the operation and development of the hospital, must be recognized as an equally important part of the reason for its existence.

Board members who serve on a voluntary basis must be ready to view their trusteeship as a time-demanding, yet fulfilling, commitment, and the hospital's administration must ensure that the governing body has the information and assistance to function properly. Careful selection and orientation of new trustees will inevitably lead to a more effective board.

American Hospital Association

Guidelines

Role and Functions of the Hospital Governing Board*

This guideline document is intended to provide general advice to the membership of American Hospital Association, as approved by the General Council.

Introduction

The hospital governing board has the ultimate authority and responsibility for patient care and the overall quality of service in the hospital. The governing board's authority derives from the organization itself; therefore, the board is legally accountable to the organization for its policies and perfor-

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* See also AHA *Policy on Imperatives of Hospital Leadership, Guidelines on Role and Functions of Hospital Executive Management,* and *Guidelines on Role and Functions of the Hospital Medical Staff.*

Recognizing that hospitals are dynamic, ever-changing institutions, in 1980 the American Hospital Association appointed the Special Committee on Hospital Leadership to appraise changes in society and the implications of those changes on the future role of hospitals. It had been more than 15 years since AHA last conducted such an appraisal. It was recognized that, although hospitals have made great strides in adapting to changing needs, the mission of hospitals needs to be reexamined continually and the hospital's responsibility for leadership redefined. With the assistance and contributions of AHA councils and Regional Advisory Boards, this document was drafted to describe the leadership role of the hospital governing board. These guidelines were approved by the AHA General council on April 15-16, 1981.

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mance. To fulfill this responsibility the governing board has the obligation to demonstrate leadership in determining the institutional mission and in establishing a strategic plan that is consistent with that mission and with the resources available in the community. The governing board must select a chief executive officer to carry out its policies. The governing board shares its leadership responsibility with the medical staff and executive management to establish the hospital as the organized center for improving the health status of the community.

The governing board's leadership responsibilities fall into six broad categories: organization, public policy and external relationships, strategic planning, resource management, human resources development, and education and research.

Leadership Responsibilities

Organization

The governing board has the responsibility for organizing itself effectively, for establishing and following the policies and procedures necessary to discharge its responsibilities, and for adopting bylaws in accordance with legal requirements.

The structure and composition of the governing board and the policies and procedures it follows to ensure the orderly conduct of its business are critical in fulfilling the institution's mission and goals to serve the community.

The composition of the governing board is of great importance; therefore, the board should establish procedures for the selection of members.** Members should be selected on the basis of ability to serve the institution and community effectively, not to represent particular interests or groups. Leadership characteristics, such as professional expertise, demonstrated community leadership, and active participation

** See AHA *Guidelines on Identification, Selection, and Orientation of New Hospital Trustees,* catalog no. 196726.

in other community organizations should be considered as should personal and demographic characteristics in achieving a balanced governing board.

The diversity of the board's composition should be weighed against the size needed to carry out the board's work effectively. To the extent feasible, governing board members should reside or work in the institution's service area.

Where legally permissible, the governing board should extend full voting membership on the board and its committees to the institution's chief executive officer and to a selected physician or physicians who may or may not be on the medical staff. Regardless of their voting status, however, these individuals should attend all board meetings and be encouraged to speak on all issues under consideration.

To ensure continuity, the governing board should establish a system for orderly membership selection. The system should clearly define nomination and selection procedures, tenure for members, requirements for board and committee meeting attendance, and include regular performance evaluations. The board should evaluate the performance of its committees, individual trustees, and its own performance as a ensuring that the education programs meet the needs of the institution's patient population.

Regular performance reviews, and the corrective action indicated by such reviews, will enable the institution to provide effective and efficient services of high quality.

Public Policy and External Relationships

The governing board has the authority and responsibility for monitoring and influencing public policies concerning the delivery of health care and for ensuring the establishment and maintenance of appropriate external relationships.

Health care institutions have become complex organizations with substantial public financial support. Such support

has increased the emphasis on the legal accountabilities of the institutions. Several significant court decisions have defined the institution's potential liabilities, which necessarily involve the appropriate role and authority of the governing board. The governing board is expected to govern the institution prudently and to be responsible for the actions of the institution's medical staff, employees, auxilians, and volunteers. The governing board is responsible for protecting the institution's financial well-being and for ensuring institutional compliance with applicable laws, regulations, codes, and standards.

The health care institution carries certain responsibilities for meeting community health care needs. This responsibility not only affects the ultimate accountability of the governing board, but has a bearing on how the governing board is viewed in terms of the direction it gives to the institution's management for the provision of appropriate community health care services.

To be responsive to the community and responsible for the quality of care provided, the governing board must keep well informed about public policy issues and decisions and assess their possible effect on the institution.

The health care institution is more than a provider of health care to the community—it is an employer, a consumer of goods and services, and a major social influence. Therefore, the governing board should participate in ongoing relationships with various segments of the public in an effort to keep the community well informed about the institution and to keep the institution well informed about the views of the community.

The governing board's external relationships may include: dialog with patients in the community to ensure the appropriateness of the institution's mission and goals and its ability to identify community health care needs; communication with local business, industry, and professional and civic organizations; liaison with other health planning and health promotion organizations that serve all or part of the same community;

liaison with the institution's local, state, and federal government representatives and agencies, as well as with the local public information media; and ongoing relations with other community service organizations, schools, and social agencies. Such relationships will help to ensure that the public's perception of its health care needs and the institution's assessments of those needs are closely aligned and that the institution's services are organized to meet those needs.

Health care institutions share many public and political interests and concerns. Governing board members, chief executive officers, administrative personnel, medical staff, auxilians, and other interested institutional groups can deal effectively with many of these common issues by supporting and actively participating in local, state, regional, and national hospital associations and other professional organizations.

Strategic Planning

The governing board has responsibility and authority, subject to the institution's charter, for determining the institution's mission and for establishing a strategic plan, goals, objectives, and policies to achieve that mission.

The mission statement should include such information as the reason for the institution's establishment, the community it serves, the types of clinical services it offers, and the future direction of the institution. The institution's goals, objectives, and policies should emanate from and be measured against the mission statement and long-range plan established by the governing board.

The governing board, with consideration for community needs and working with the institution's executive management and medical staff, should develop a long-range plan. The plan should be reviewed regularly to assess its ability to meet and further the institution's mission. The review should consider how the health care needs of the community, including the

promotion of good health practices, are being met; how the institution's short-range and long-range goals fulfill the identified needs; whether specific objectives exist for meeting those goals; whether specific institutional services meet community needs in a cost-effective manner; whether the institution has the physical resources, facilities, and personnel necessary to provide future levels and types of services; and whether the institution continues to play an appropriate role within the local health care system.

The governing board should consider the implications of its decisions on the health care system in general and on the other local health care resources in particular, and it should share its long-range goals with other institutions so that these goals are achieved in concert with other community health care providers.

Resource Management

The governing board is entrusted with the resources of the institution and with the proper development, utilization, and maintenance of those resources.

The governing board must recognize its broad responsibility to protect the limited resources both of the institution and the community. The board should ensure the cost-effective utilization of resources and that major resource allocations are consistent with the hospital's mission. The resource management and allocation system should encompass long-range and short-range financial plans, performance evaluation against the plans, and regular financial reports to the board. The board should continually review the types and scope of services being offered and be aware of any individual special interests that might influence resource allocations.

The governing board should ensure that adequate capital is available for the institution's investment strategies and should routinely monitor intermediate and short-term operational fund

balances. To accomplish this task, the governing board should require the preparation of and adherence to annual operating and capital budgets and regular financial reports, reviews, and audits.

The board should actively encourage philanthropic support to the hospital. This can be done most effectively by calling to the attention of its members, its executives and medical staff, and the community appropriate areas to which philanthropic efforts may be directed. Proposals on how to encourage philanthropy should be included in the hospital's financial plans and management systems.

Human Resources Development

The governing board has the responsibility and authority for the organization, protection, and enhancement of the institution's human resources.

The quality of care provided by an institution is directly affected by the quality of its staff. This resource is the key contributor to the successful fulfillment of the institution's mission and goals. Although the governing board delegates operational authority to management for the recruitment, selection, development and proper use of the institution's human component, the governing board should be assured through management reports that an effort is made to keep abreast of the attitudes and concerns of volunteers and staff regarding their work environment. The governing board also needs to be assured that applicable laws and regulations are being observed and that wages and benefits are appropriate.

Education and Research

The governing board is responsible for the provision of health care educational and research programs that further the hospital's mission.

The governing board, along with the medical staff and executive management, should determine how the hospital is to carry out its responsibility for health care education. This responsibility includes the provision of well-designed educational programs that are consistent with the hospital's mission and that the responsibility for their direction is clearly defined. The board should ensure that the educational programs are of demonstrable quality, are properly funded, are evaluated regularly, and that the dignity of patients is stressed in all programs.

The hospital may wish to conduct its own research or to cooperate in or support the research activities of other hospitals. In either case, the board, medical staff, and executive management share the responsibility for ensuring that proper standards and procedures are imposed to protect the patient, the hospital, and available resources.

Summary

The governing board plays the major role in shaping the hospital's commitment to improving the health status in its community. Through its interdependent relationships with the medical staff and executive management, the board can substantially guide the hospital as the center for the improvement of the community's health and well-being.

SISTERS OF THE PALLOTTINE MISSIONARY SOCIETY

BYLAWS OF THE GOVERNING BOARD

ST. JOSEPH'S HOSPITAL AND NURSING CARE FACILITY

Buckhannon, West Virginia

Adopted: October 6, 1954
Amended: October 15, 1963
Amended: October 15, 1968
Amended: April 24, 1972
Amended: February 21, 1975
Amended: April 9, 1976
Revised: November 20, 1977
Reviewed: October 27, 1978
Reviewed: September 10, 1979
Amended: February 22, 1980
Reviewed: March 10, 1981
Revised: February 12, 1982
Reviewed: March 2, 1984

SISTERS OF THE PALLOTTINE MISSIONARY SOCIETY

BYLAWS OF THE GOVERNING BOARD

ST. JOSEPH'S HOSPITAL AND NURSING CARE FACILITY

Buckhannon, West Virginia

PREAMBLE:

The Sisters of the Pallottine Missionary Society was issued a charter for a non-profit corporation by the Secretary of State, Charleston, West Virginia, on September 20, 1932.

St. Joseph's Hospital is a cummunity hospital that promotes goodwill and is operated in accordance with the needs of the community it serves.

The Nursing Care Facility provides skilled and long-term intermediate care with special attention to the emotional and social needs of the patients.

PHILOSOPHY:

The philosophy of the Governing Board of St. Joseph's Hospital and the Sisters of the Pallottine Missionary Society is based on the fundamental Christian principle that a human being is composed of body and soul, made to the image and likeness of God, and that he has an eternal destiny which is union with God. We believe in the moral teaching of the Roman Catholic Church, and of its dedication to the preservation of human life in all its forms and at all stages of its development. We believe that patients and personnel have intrinsic worth and dignity, and in the spirit of St. Vincent Pallotti we serve the rich and the poor, regardless of race, color or creed, for "The charity of Christ urges us on."

An atmosphere of cooperation, friendliness, and courteousness reflecting respect for the feelings and needs of the sick and injured as well as the personnel is required in order to be able to operate in a most efficient and economical manner so as to provide a high level of excellence in patient care.

It is necessary for the practice of good medicine to have qualified, conscientious physicians and dentists on the medical and dental staff who have the cooperation and assistance of the Governing Board and administration of the hospital. It is also necessary to provide an adequate and competent staff of professional, technical and other personnel to achieve high quality patient care.

We believe we have the obligation to demand from all persons in the organization an accountability for performance, including adherence to professional and institutional standards, and to the ethical and moral principles held by the facility and conduct in accord with respect for the dignity of all persons. In return, we feel compensation should be commensurate with the individual's duties and responsibilities.

We believe that facilities and equipment necessary to keep pace with the advances in medical science and to meet the community's health needs are essential if the hospital and the nursing care facility are to prevent illness and restore health.

The hospital has an obligation to further education and research according to available resources in order to prepare personnel to carry out their functions and responsibilities adequately and to achieve excellence in patient care.

SPECIFIC PHILOSOPHY OF THE NURSING CARE FACILITY:

a. Patients requiring long-term care have special needs which are not experienced by those suffering from an acute illness who can expect to recuperate within a period of a few weeks. These needs are intensified by the fact that long-term

care patients are often persons of the older age group and therefo.e their care requires:

1. Prevention of disabilities intensified by the aging process.

2. Special attention to the emotional and social needs created by the aging process.

3. Restoration of the person to a level consistent with the limitation imposed by the aging process.

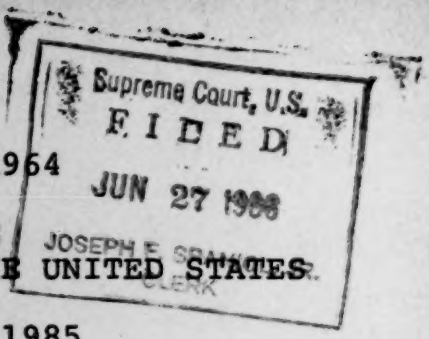
These principles shall also be applied to those patients of the younger age group who require a long convalescent period following extensive injuries or debilitating disease.

b. Geriatric nursing requires the use of current knowledge of aging learned from the biological, physical and behavioral sciences. The nurse must exercise professional judgment in selecting knowledge of nursing and in using this knowledge to meet the needs of the geriatric patient.

c. The long-term care patient requires more than caring for the immediate physical needs of the patient . . . . it requires the understanding and caring and meeting the basic needs through generous giving of human kindness.

d. The leadership of the nursing care facility will endeavor to help all personnel to understand that although physical impairments may limit or prevent communication, the basic needs of the person remain and it will be our function to find a way to let the patient know that we understand his concern.

(2)



NO. 85-1964

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER, 1985

AMERICAN HOSPITAL ASSOCIATION, et al.,

Plaintiffs-Petitioners,

v.

DAVID K. HEYDINGER, M.D.,
Director of the West Virginia
Department of Health,

Defendant-Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT . . .	3
ARGUMENT	
I. WEST VIRGINIA CODE § 16-5B-6a DOES NOT RAISE A FIRST AMENDMENT FREEDOM OF SPEECH ISSUE.	6
II. PETITIONERS DO NOT OBJECT TO ASSOCIATING WITH INDIVIDUALS MEETING THE REQUIREMENTS OF THE WEST VIRGINIA STATUTE, AND THEREFORE, NO RIGHT OF FREEDOM OF ASSOCIATION IS IMPLICATED BY THE STATUTE.	18
III. THIS COURT EXERCISES ITS DISCRETION NOT TO REVIEW CONSTITUTIONAL ISSUES NOT PREVIOUSLY RAISED IN LOWER FEDERAL COURTS WHEN THERE HAS BEEN NO SUBSTANTIAL CHANGE IN THE CONSTITUTIONAL ISSUE RAISED. .	25
CONCLUSION	29

TABLE OF AUTHORITIES

	Page
Cases:	
American Hospital Association v. Hansbarger, 600 F. Supp. 465 (N.D. W. Va. 1984)	15, 20
Blue Cross of Iowa v. Foudree, 606 F. Supp. 1574 (S.D. Iowa 1985)	23
Consolidated Edison Co. v. Public Service Commission of New York, 447 U.S. 530 (1980)	16, 27
Curtis Publishing Company v. Butts, 388 U.S. 130 (1967)	28
Duignan v. United States, 274 U.S. 195 (1927)	29
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	16, 27
Michel v. Louisiana, 350 U.S. 91 (1955)	27, 28

TABLE OF AUTHORITIES (cont'd)

	Page
Pacific Gas and Electric Company v. Public Utilities Commission of California, 54 U.S.L.W. 4149 (U.S. February 27, 1986)	10, 11, 14, 15, 16, 17, 18, 25, 26, 27, 28, 29
Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984)	19, 20, 21, 22
Yakus v. United States, 321 U.S. 414 (1943)	28
Youakim v. Miller, 425 U.S. 231 (1976)	28, 29
Statutes:	
West Virginia Code § 16-5B-6a	2, 3, 6, 11, 12, 16, 20, 21
West Virginia Health Care Corporations Act, Chapter 33-25, § 4 (1982)	23, 24

NO. 85-1964

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

AMERICAN HOSPITAL ASSOCIATION,
WEST VIRGINIA HOSPITAL ASSOCIATION;
STONEWALL JACKSON MEMORIAL HOSPITAL
COMPANY; CHARLES TOWN GENERAL HOSPITAL;
WEIRTON MEDICAL CENTER, INC.;
SISTERSVILLE GENERAL HOSPITAL;
WHEELING HOSPITAL, INC.; and
THE CATHOLIC HEALTH ASSOCIATION OF
THE UNITED STATES,

Plaintiffs-Petitioners,

v.

DAVID K. HEYDINGER, M.D.,
Director of the West Virginia
Department of Health,

Defendant-Respondent.

BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

This is a petition for certiorari from a per curiam affirmance by the Fourth Circuit of a trial court's decision upholding a statute of the State of West Virginia from constitutional attack by the petitioners, inter alia, upon grounds that the challenged statute violated rights protected by the United States Constitution. The statute in question, West Virginia Code § 16-5B-6a, requires the boards of directors of nonprofit and local governmental hospitals to be composed of 40 percent of members from certain categories. The categories specified in the statute are small business, organized labor, the elderly, and low-income persons. Petitioners contend that West Virginia Code 16-5B-6a violates their First Amendment rights. The

statement of the case supplied by the petitioners is improper in that it incorporates conclusions of law and fact not supported by the record along with arguments which should be placed in the appropriate portion of the petition.

David K. Heydinger, M.D., Director of the West Virginia Department of Health, Defendant-Respondent, hereby petitions this Court not to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

SUMMARY OF THE ARGUMENT

1. West Virginia Code § 16-5B-6a provides that 40 percent of the members on the boards of directors of nonprofit hospitals and local government owned

hospitals must be representative of four consumer categories: small businesses, organized labor, the elderly, and persons whose income is less than the national median income Nowhere on the face of this statute does it place any restrictions on the boards' freedom of speech. The boards are not required to place persons on these boards whose views are in opposition to theirs. Further, they are not forced to do battle in the public arena on issues in which they would prefer to remain silent. The statute in question does not hamper corporate free speech, but rather provides a means by which hospitals may become more aware of their respective communities' needs.

2. The West Virginia statute does not unnecessarily infringe upon the

freedom of association rights possessed by the boards of directors of nonprofit and local government hospitals. The law does not force hospital boards to associate with those whom they would rather not associate with, but instead requires that they be more sensitive to those groups with whom they have some associational contact already. Therefore, this statute is not associational in nature and does not violate the First Amendment's right to freedom of association. The hospitals in question are still free to pick and choose persons who best fulfill their required qualifications.

3. This Court has acknowledged as a general rule that issues not raised in the courts below cannot now be raised for the first time. There are a few exceptions, however, such as the Court

may permit the raising of new issues if there have been exceptional circumstances or if there has been a substantial intervening change in the law. The case at bar neither addresses any exceptional circumstances nor does it address any substantial intervening changes in the law. Therefore, the petitioners have effectively waived any rights to raising a new issue at this time.

ARGUMENT

I.

WEST VIRGINIA CODE § 16-5B-6a DOES NOT RAISE A FIRST AMENDMENT FREEDOM OF SPEECH ISSUE.

West Virginia Code § 16-5B-6a is not a statute designed to restrict nor does it restrict the freedom of speech rights possessed by the board of directors of privately owned nonprofit

hospitals and local government hospitals. The statute's purpose is to control the ever-rising costs of health care in West Virginia by requiring that hospitals be more cognizant of their communities' needs by having boards of directors that are representative of the communities they serve. In order to implement this policy, the Legislature has mandated that at least forty percent of the board members of the affected hospitals be representative of the following four major consumer categories: small businesses, organized labor, elderly persons, and persons whose income is less than the national median income. The idea is that by requiring broader community participation in health care planning the increase in hospital costs will be retarded.

The petitioners posit that the statute restrains the exercise of free speech by the board of directors of subject hospitals. No restraint of speech is obvious on the face of the statute. It, by its terms, neither requires or prohibits any speech. Petitioners make no argument that there is a restraint of speech on the face of the statute. Absent any apparent restraint of speech on the face of the statute, the petitioners attempt to manufacture a restraint on speech.

This manufactured restraint requires that the assumptions made by petitioners respecting board members qualifying and designated as representative of the four groups must be accepted as immutable laws of nature. The petitioners assume, albeit sub silentio,

that a representative board member must and will hold views antagonistic to the board of directors. (The corollary assumption to this is that all boards of directors are ideological monoliths that never have a dissenting voice among the membership.) Thus, the petitioners would have the Court believe that by being required to associate with board members representative of the various groups designated in the statute, the board will be forced to be a platform for the views of these representative members which are always and necessarily repugnant and antagonistic to the views of the remaining majority of the board.

The petitioners ask the Court to accept as an article of faith that the posited restraint of speech would thus occur. But, beyond this appeal to

faith, the petitioners make no attempt to explain how freedom of speech will be impaired. Petitioners have attempted to blur the distinction between freedom of speech and freedom of association in an effort to link this case with the recent decision of this Court in Pacific Gas & Electric Company v. Public Utilities Commission of California, 54 U.S.L.W. 4149 (U.S. February 27, 1986). That case clearly dealt with freedom of speech; the instant case does not. In Pacific Gas & Electric, the appellant contested a state utility commission's order, which required Pacific Gas & Electric to put in its billing envelopes printed material espousing views diametrically opposed to the views of Pacific Gas & Electric. This printed material came from organizations that

actually opposed Pacific Gas & Electric in proceedings before the utility commission. The forced inclusion of the printed material in the billing envelopes had the direct effect of hampering Pacific Gas & Electric's free speech.

By contrast, the case at bar involves no requirement that any speech occur. The hospital boards of directors are free to remain absolutely silent if they wish. Unlike the utility commission's order in Pacific Gas & Electric, supra, nothing in West Virginia Code § 16-5B-6a requires hospitals to identify themselves with opposing viewpoints.

The petitioners raise the fear that designated board members must and will hold dissenting viewpoints from those held by the nondesignated members. There is nothing in the statute at issue

that requires or suggests that the members of a board of directors designated as representative of various segments of the community must hold any viewpoint, let alone a viewpoint diametrically opposed to the viewpoint of the nondesignated board members. There is no language in West Virginia Code § 16-5B-6a that requires that hospital boards of directors must be forums for opposing views. Additionally, it cannot be gainsaid that nondesignated board members may very well become hectoring dissenters from the views of the majority. Absent the requirements of the statute, the petitioners cannot distinguish the effect of dissent by a nondesignated board member from dissent by a designated board member. Under petitioners'

argument any dissent is a restraint on free speech.

Additionally, it may well be that individuals who qualify for these designations as consumer representatives for the enumerated classes, namely elderly, small business, labor, and low-income, are presently sitting on the boards of hospitals. Thus, compliance with this law might not require any change in the existing composition of the boards of the affected hospitals.

If, in fact, one or more categories are not already filled and more board members must be added to comply with the law, the selection of those additional board members will be accomplished by each individual hospital board itself. These consumer representatives will be interviewed, nominated and elected in

accordance with hospital bylaws. They will not be chosen and forced on the hospital by the state or any labor union or consumer group. The hospitals are free to choose a new board member, if one is needed, to satisfy the low-income requirement, for example, by choosing a low-income person whose views comport with or are identical to those of the other members of the board.

It is clear that the decision in Pacific Gas & Electric, supra, on which petitioners rely heavily, is entirely distinguishable from the case at bar. No West Virginia hospital will be required to disseminate the ideas of opponents in their billing envelopes, nor will they be forced to associate themselves before the public with the ideas of other organizations or contrary

viewpoints. The hospitals will only be required to have board members, of their own choosing, meeting certain criteria that are "idea-neutral" or "content-neutral." The West Virginia statute, thus, does not offend the ruling of this Court in Pacific Gas & Electric, supra.

As the trial court in the instant case noted, "[t]he Act does not require Catholic hospitals to alter their Creed or beliefs, nor does it prevent them from excluding individuals with ideologies or philosophies different from those of its existing members." American Hospital Association v. Hansbarger, 600 F. Supp. 465, 475 (N.D. W. Va. 1984).

On the other hand, if this Court finds that the West Virginia statute envisions input from different

perspectives, this does not offend the free-speech rights of the corporation. As was noted in Pacific Gas & Electric, "the critical considerations were that the state sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed." (Emphasis added) Pacific Gas & Electric, 54 U.S.L.W. 4149 at 4154 citing First National Bank of Boston v. Bellotti, 435 U.S. 765 at 776-778, 781-783 (1978); Consolidated Edison Co. v. Public Service Comm'n of N.Y., 447 U.S. 530 at 533-535 (1980). West Virginia Code § 16-5B-6a does not restrain the affected hospital boards of directors from dispensing information to the public. In fact, by requiring that at least a

certain percentage of the board members be representative of certain consumer categories, the West Virginia statute is encouraging the exchange of ideas that this Court has found to be a vital element of the First Amendment.

Additionally, respondent notes that, unlike the utility commission order at issue in Pacific Gas & Electric, supra, the statute challenged herein in no way encourages the involvement of hospitals, or their boards, in controversial public issues which they would not otherwise have faced. The effect of this law is not to create controversy, but to make hospitals more aware of their respective community's needs.

II.

PETITIONERS DO NOT OBJECT TO ASSOCIATING WITH INDIVIDUALS MEETING THE REQUIREMENTS OF THE WEST VIRGINIA STATUTE AND, THEREFORE, NO RIGHT OF FREEDOM OF ASSOCIATION IS IMPLICATED BY THE STATUTE.

As mentioned above, the petitioners have confused freedom of speech and freedom of association. While this Court used language in Pacific Gas & Electric, 54 U.S.L.W. at 4154, that "forced association" with potentially conflicting views "burdens free speech," there is a difference between a corporation forced to associate itself in public with opposing views and a hospital board required to associate at a board meeting with individuals, of their own choosing, who meet certain qualifications.

Part I of this Argument pointed out that the West Virginia statute will have

no effect on the hospitals' freedom of speech. While the case at bar is not a case that affects freedom of speech, petitioners indirectly argue that it is a case which affects freedom of association. Petitioners face significant obstacles to prevailing on a freedom of association theory.

The most recent freedom of association case is Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984), in which this Court held that it did not illegally infringe on the Jaycees freedom of association for a state law to compel the Jaycees to accept women as regular members. It was a fundamental tenet of the Jaycee creed that the organization's regular membership was to be exclusively male. The Jaycees specifically and vigorously objected to the state law based

attempt to require association with women members.

Unlike the appellants in the Jaycees case, petitioners herein do not object to associating with individuals who are members of the categories set forth in Code 16-5B-6a. As the trial court noted in the case sub judice:

> "Indeed, testimony revealed that the plaintiffs do not exclude members of the categories set forth in the Act and that some board members of Catholic Hospitals qualify in at least one or more categories set forth in the statute. * * *" American Hospital Assoc., 600 F. Supp. at 475.

In Jaycees the petitioners designated themselves as a male group: the exclusion of women from full membership was part of the asserted group identity of the Jaycees.

The petitioners here do not object to association with elderly, labor,

low-income and small business people. They merely object to the compulsion to associate. However, if there is no objection to the association, as the Jaycees objected to women as regular members, then petitioners cannot complain when they are compelled to associate with persons with whom they have no objection to associating. The abstract "right" to be free from compulsion, as a voluntary participant in a highly regulated industry, is not a "right" at all, much less one protected by the Federal Constitution.

Even were this Court to determine that petitioners had interposed an objection to the association required by West Virginia Code 16-5B-6a, Jaycees makes it quite clear that this objection is insufficient to afford petitioners

protection under the United States Constitution.

The Court in Jaycees described the sort of association which does not qualify as highly personal: "an association lacking these qualities (of smallness, intimacy) such as a large business enterprise." (parenthetical added) Jaycees, 104 S. Ct. at 3251. A hospital is a large business enterprise, and thus does not enjoy these constitutional protections. In fact, hospitals, being employers, are routinely sued for failure to hire women, blacks and other categories of protected individuals under human rights statutes such as the one in Jaycees. They are thus forced to associate with women, blacks, and others, even though they might prefer otherwise. Hospitals are public

institutions, not private clubs, and their boards are not entitled to the absolute constitutional protection they seek to have this Court impose.

More specifically, the boards of directors of large business enterprises, such as hospitals, have had their freedom of association restricted in several ways, without successful challenge. For instance, in Blue Cross of Iowa v. Foudree, 606 F. Supp. 1574 (S.D. Iowa 1985), the court held that Iowa's statute, requiring that two thirds of the membership of the board of directors of Blue Cross must be composed of subscribers as opposed to providers, does not violate the Due Process Clause. Similarly, West Virginia Code § 33-25-4 pertaining to health care corporations provides that:

> "The board of directors of any corporation organized under this article shall consist of at least seven members, all of whom shall be residents of the State of West Virginia, a majority of whom shall be subscribers to its services, one of whom shall be a person licensed to practice medicine under the laws of the State of West Virginia, one of whom shall be a person connected with the healing arts, and one of whom shall be a member of the general public not connected with any contracting party. The members of the board shall serve without compensation but may be reimbursed for expenses incurred in carrying out their duties as members of the board."

These are but two examples of the prevalent regulations of boards of directors of business enterprises in the health care context. A blanket prohibition on the ability of states to regulate the composition of boards of directors would seriously hamper the regulatory schemes of the states.

III.

THIS COURT EXERCISES ITS DISCRETION NOT TO REVIEW CONSTITUTIONAL ISSUES NOT PREVIOUSLY RAISED IN LOWER FEDERAL COURTS WHEN THERE HAS BEEN NO SUBSTANTIAL CHANGE IN THE CONSTITUTIONAL ISSUE RAISED.

Petitioners raise the constitutional issue of corporate free speech for the first time before this Court. The petitioners could have raised this issue at the United States District Court or the United States Court of Appeals for the Fourth Circuit, but did not do so. Petitioners give no reason for their failure to raise this issue below.

This Court could note sua sponte that the United States Court of Appeals for the Fourth Circuit rendered their decision in the case at bar on February 27, 1986, whereas this Court decided Pacific Gas & Electric, supra,

on February 25, 1986, and could conclude that petitioners did not raise this constitutional issue of corporate free speech because they could not have known of the defense prior to the announcement of the decision in Pacific Gas & Electric.

Respondent notes, however, that the petitioners are sophisticated litigants who knew of this constitutional argument, even though Pacific Gas & Electric had not been decided until after the case at bar had been argued before the United States Court of Appeals for the Fourth Circuit, and, thus, petitioners by not raising this issue below have waived it. It can be asserted that petitioners knew of this argument, because, as the numerous citations in the Pacific Gas & Electric opinion

demonstrate, there is a rich history of decisions upholding the corporate right of free speech, most notably First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), and Consolidated Edison Company v. Public Service Commission of New York, 447 U.S. 530 (1980). Pacific Gas & Electric was not a case of first impression. Petitioners knew or should have known of Bellotti and Consolidated Edison. However, they failed to raise the issue of corporate free speech at the United States District Court or the Fourth Circuit Court, even though they raised a multitude of other constitutional objections.

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right * * * ." Michel v. Louisiana,

350 U.S. 91 at 99 (1955), quoting Yakus v. United States, 321 U.S. 414 at 444 (1943).

"[E]ven constitutional objections may be waived by a failure to raise them at a proper time," Curtis Publishing Company v. Butts, 388 U.S. 130 at 143 (1967), if it is a known right, thus precluding the assertion of the objections on appellate review.

Even if this Court concludes that Pacific Gas & Electric was a change in constitutional law rather than merely an extension of previous cases, and further concludes that it is a change which petitioners could not have contemplated, this Court has adopted the position that issues not raised below are waived unless there is a substantial change in the law or extraordinary circumstances.

> "It is only in exceptional cases coming here from the

> federal courts that questions not pressed or passed upon below are reviewed." Youakim v. Miller, 425 U.S. 231 at 234 (1976), quoting Duignan v. United States, 274 U.S. 195 at 200 (1927).

In Youakim, the United States Department of Health, Education and Welfare had completely changed their regulations in the intervening period.

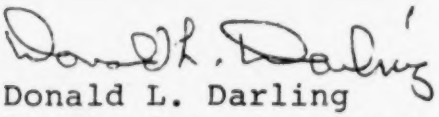
Respondent contends that even if Pacific Gas & Electric is a change in the law, it is not such a substantial change in the law that this Court should ignore petitioners waiver of this objection.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court let stand the decisions of the courts below and decline to issue a writ of certiorari to review the

judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



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AFFIDAVIT OF FILING AND
CERTIFICATE OF SERVICE

I, Donald L. Darling, hereby certify that I am Counsel of Record and a member of the Bar of this Court and that, to my knowledge, the Brief of the Director of the West Virginia Department of Health, David K. Heydinger, M.D., was properly filed with the Clerk of this Court and served on Petitioners' Counsel of Record on June 27, 1986, within the time permitted for the same. Such filing and service were accomplished in that, to my knowledge, the document was deposited at the United States Post Office, Charleston, West Virginia, with first-class postage prepaid, forty copies of the Brief of the Director of

the West Virginia Department of Health, David K. Heydinger, M.D., properly addressed to the Clerk of this Court, as well as three copies of same properly addressed to each of the following at his post office address: Richard L. Epstein, Esquire; Linda A. Tomaselli, Esquire; and Ida S. Rothschild, Esquire (Counsel of Record for Petitioners); American Hospital Association, 840 North Lake Shore Drive, Chicago, Illinois 60611.

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June 27, 1986

State of West Virginia,

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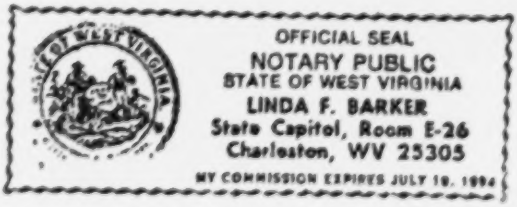
Taken, subscribed and sworn to before me this 27TH day of June, 1986.

Linda F. Barker
Notary Public

My commission expires July 19, 1994.



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(3)

No. 85-1964

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN HOSPITAL ASSOCIATION; WEST VIRGINIA HOSPITAL ASSOCIATION; STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY; CHARLES TOWN GENERAL HOSPITAL; WEIRTON MEDICAL CENTER, INC.; SISTERSVILLE GENERAL HOSPITAL; WHEELING HOSPITAL, INC.; and The CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES,

Plaintiffs-Petitioners,

v.

DAVID K. HEYDINGER, M.D.,
Director of the West Virginia Department of Health,

Defendant-Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

Introduction 1

Argument

I. The State—Compelled Association Mandated by West Virginia Code § 16-5B-6a Infringes Upon Protected First Amendment Rights of Hospitals 2

II. West Virginia Code § 16-5B-6a Burdens Protected Rights of Expression By Forcing Association With Potentially Conflicting Viewpoints 3

III. Respondent Does Not Even Attempt to Justify West Virginia Code § 16-5B-6a As A Narrowly Tailored Means of Serving A Compelling State Interest 4

IV. Petitioners' Constitutional Claim That West Virginia Code § 16-5B-6a Abridges First Amendment Rights Was Briefed and Argued Below 5

Conclusion 6

TABLE OF AUTHORITIES

Cases

PAGE

Blue Cross v. Foudree, 606 F. Supp. 1574 (S.D. Iowa 1985) 2, 3

Buckley v. Valeo, 424 U.S. 1 (1976) 4

Pacific Gas and Electric Co. v. Public Utilities Commission, 54 U.S.L.W. 4149 (U.S. Feb. 25, 1986) 2, 4

Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984) 2, 4

State Statutes and Regulations

W. Va. Code § 16-5B-6a ..... *passim*

Miscellaneous

Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals* (1986) 4

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AMERICAN HOSPITAL ASSOCIATION; WEST VIRGINIA HOSPITAL ASSOCIATION; STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY; CHARLES TOWN GENERAL HOSPITAL; WEIRTON MEDICAL CENTER, INC.; SISTERSVILLE GENERAL HOSPITAL; WHEELING HOSPITAL, INC.; and The CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES,

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v.

DAVID K. HEYDINGER, M.D.,
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Defendant-Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTRODUCTION

The case involves important First Amendment rights of association and speech, abridged by a West Virginia statute requiring that designated special interest representatives be appointed to and constitute fully 40 percent of the boards of directors of all privately owned non-profit hospitals and local governmental hospitals. In his Response to the Petition for a Writ of Certiorari, the Respondent has seriously misconstrued the burdensome and unlawful effect of the statute at issue (W. Va. Code § 16-5B-6a) as well as the nature of the constitutional claims raised by the Petitioners both below and in their petition to this Court.

I. The State-Compelled Association Mandated by West Virginia Code § 16-5B-6a Infringes Upon Protected First Amendment Rights of Hospitals

As demonstrated in the Petition for a Writ of Certiorari, effective hospital governance requires that directors be chosen on the basis of the needs of that hospital and not as special interest representatives. Hospital boards of directors typically exercise a "high degree of selectivity in decisions to begin and maintain the affiliation. . . ." *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3250 (1984).

Of course, in selecting individuals who possess the necessary qualifications, West Virginia hospitals have always been free to draw from all categories of persons, and in fact do so. In fact, Respondent acknowledges that Petitioners include persons from the specific classes on their boards. Thus, contrary to the assertions of Respondent, the actual effect of W. Va. Code § 16-5B-6a is to force the appointment of persons who might not be selected at all but for the need to meet the 40 percent special interest representation required by the statute. This "compulsion to associate," which is the plain effect of W. Va. Code § 16-5B-6a, constitutes a clear and burdensome interference with the right of a hospital to select those who will serve as its directors. *See Pacific Gas and Electric Co. v. Public Utilities Commission*, 54 U.S.L.W. 4149, 4153 (U.S. Feb. 25, 1986); *Jaycees*, 104 S. Ct. at 3250-51, 3254.[1]

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[1] Respondent's brief asserts that "the boards of directors of large business enterprises, such as hospitals, have had their freedom of association restricted in several ways" (Brief of Respondent, at 23), but then can offer no example involving a hospital. Rather, Respondent relies for this proposition on *Blue Cross v. Foudree*, 606 F. Supp. 1574 (S.D. Iowa 1985), which upheld a statutory change in the provider-subscriber composition of the boards of non-profit hospital service plans (Blue Cross) and non-profit medical and surgical service plans (Blue Shield). Yet Respondent does not explain either the special circumstances surrounding the historical development of such

(Footnote continued on following page.)

In his brief, the Respondent concedes that the statute at issue includes a "compulsion to associate" (Brief of Respondent at 21). However, Respondent goes on to argue that state-compelled association does not implicate protected First Amendment rights unless the affected hospitals would otherwise object to associating with *all persons* from any of the special interest categories designated in W. Va. Code § 16-5B-6a—i.e., small business, organized labor, the elderly, and persons whose income is less than the national median income. Specifically, Respondent argues that unless the compulsion extends to all persons within the class no First Amendment rights are implicated. The First Amendment contains no such restrictions.

II. West Virginia Code § 16-5B-6a Burdens Protected Rights of Expression By Forcing Association With Potentially Conflicting Viewpoints

Although acknowledging that "there is a rich history of decisions upholding the corporate right of free speech" (Brief of Respondent, at 27), Respondent claims not to understand either the nature of the right of free speech at issue in this case or the manner in which W. Va. Code § 16-5B-6a operates to infringe upon that constitutionally protected right. As this

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(Footnote continued from preceding page.)

plans in Iowa (and elsewhere), or the unique nature of the regulation to which such plans had always been subject. *See, e.g., id.* at 1576, 1582 ("[t]he provider-subscriber composition of plaintiffs' boards has always been dictated by statute"). Respondent also does not explain that in return "the State of Iowa has given plaintiffs several advantages over their commercial competitors . . . includ[ing] an exemption from both the state insurance premium tax and all other provisions of the state insurance laws." *Id.* at 1576. Certainly Respondent does not acknowledge that according to the *Foudree* court itself, there is a significant factual distinction between the plaintiffs there and both its commercial competitors and other highly regulated corporations, even public utilities. *Id.* at 1578.

Court explained, a corporation has "the right to be free from governmental restrictions that abridge its own rights in order to 'enhance the relative voice'" of others. *Pacific Gas and Electric*, 54 U.S.L.W at 4153 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 & n. 55 (1976)).

A hospital's board of directors is that body within the institution directly responsible for setting hospital policy, as well as for the institutional management and planning. *See, e.g.*, Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals* 4.1 (1986). *See also* Petition for a Writ of Certiorari, at 10-12. Through W. Va. Code § 16-5B-6a, the State has sought to force the appointment of directors based upon their status as special interest advocates, rather than as fiduciaries who share an overriding commitment to serving the mission of the hospital. Respondent seriously misses the mark when he argues that one "cannot distinguish the effect of dissent by a nondesignated board member from dissent by a designated board member." (Brief of Respondent, at 12.) The critical point is the compulsion exerted by the State for, as this Court held in *Pacific Gas and Electric*, "[s]uch forced association with potentially hostile views" burdens protected expression. 54 U.S.L.W. at 4154.

III. Respondent Does Not Even Attempt to Justify West Virginia Code § 16-5B-6a As A Narrowly Tailored Means of Serving A Compelling State Interest

The decisions of this Court establish that any infringement by the State on protected First Amendment rights can be valid only where it represents "a narrowly tailored means of serving a compelling state interest." *E.g., Pacific Gas and Electric*, 54 U.S.L.W. at 4154. *See also Jaycees*, 104 S. Ct. at 3252. Respondent, however, does not even attempt to justify W. Va. Code § 16-5B-6a in such terms. Instead Respondent relies solely upon his erroneous threshold argument that the statute does not implicate First Amendment rights. Nonetheless, it is reasonable to interpret Respondent's silence on this crucial issue

as tacit acknowledgement that W. Va. Code § 16-5B-6a cannot be justified as a narrowly tailored means of serving a compelling state interest. Indeed, Respondent is understandably unable to demonstrate *any* relationship at all between the means chosen by the State and what is a legitimate interest in cost containment.

As explained in Petitioner's main brief, W. Va. Code § 16-5B-6a can have no material independent effect upon hospital costs. *See generally* Petition, at 14-17. In fact, the uncontroverted testimony established that between the State's own permanent hospital rate-setting methodology and federal law, 100 percent of the funds received by West Virginia hospitals for health care services are established or controlled by operation of state and federal law. *See* Petition, at 15 (citing App. G, at 1g). Thus, the State can and "[i]ndeed . . . already does" serve "[its] interest through means that would not violate appellant's First Amendment rights . . . ." *Pacific Gas and Electric*, 54 U.S.L.W. at 4154 & n. 16. Thus, once this Court determines that W. Va. Code § 16-5B-6a interferes with the exercise of protected First Amendment rights by affected hospitals, that statute must be invalidated.

IV. Petitioners' Constitutional Claim That West Virginia Code §16-5B-6a Abridges First Amendment Rights Was Briefed and Argued Below

Respondent also erroneously claims that Petitioners "raise the constitutional issue of corporate free speech for the first time before this Court." *See* Brief of Respondent, at 25-29. The issue whether W. Va. Code § 16-5B-6a abridges protected First Amendment rights was briefed and argued before the United States Court of Appeals for the Fourth Circuit. *See, e.g.*, Brief of Plaintiffs-Appellants, at 8 *et. seq.*, 29 *et seq.* Of course, Petitioners could not have relied upon this Court's recent decision in *Pacific Gas and Electric Co. v. Public Utilities Commission* because it had not been decided at that time.

CONCLUSION

For the reasons stated above and in their Petition for a Writ of Certiorari, Petitioners respectively request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

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